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THE

TRIAL

OF

SIR ARCHIBALD GORDON KINLOCH,

OF GILMERTON, BART.

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THE

TRIAL

OF

SIR ARCHIBALD GORDON KINLOCH,

OF GILMERTON, BART.

FOR THE MURDER OF

SIR FRANCIS KINLOCH, BART.

HIS BROTHER-GERMAN.

Before the High Court of Justiciary on Monday June 29. 1795.

TAKEN IN SHORT HAND,—AND CAREFULLY REVISED BY THE COUNSEL.

EDINBURGH:

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AND G. G. AND J. ROBINSON, LONDON.

1795.

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THE

THE

TRIAL

OF

SIR ARCHD. GORDON-KINLOCH, BART.

THE Prisoner was brought to the Bar a little before 10 o'clock.—He was dressed in black; and his demeanour was decent and respectful. He was attended by Sir Foster Cunliffe, Bart. his brother-in-law, and James Wilkie of Foulden, Esq; his cousin-german.

The Judges, in their Justiciary-robes, preceded by a Macer, bearing the Justiciary Mace, soon after took their places on the Bench in the following order, *viz.*

LORD JUSTICE CLERK,
Lord ESKGROVE, Lord DUNSINNAN,
Lord SWINTON, Lord CRAIG.

In support of the Prosecution, appeared

ROBERT DUNDAS, Esq; his Majesty's Advocate,
ROBERT BLAIR, Esq; Solicitor-General,
JOHN BURNET, Esq; Advocate,
Mr HUGH WARRENDER, Agent.

For the Pannel, appeared

DAVID HUME, Esq;
CHARLES HOPE, Esq;
WILLIAM RAE, Esq;
DAVID MONYPENNY, Esq;
} Advocates.

Mess. JAMES and CHARLES BREMNER, Agents.

Silence being proclaimed, the Clerk of Court ordered a Macer to call Robert Dundas, Esq; his Majesty's Advocate, for his Majesty's interest, against Major Sir Archibald Gordon-Kinloch of Gilmerton, Baronet; which being done with the usual forms and solemnities, the Lord Justice Clerk desired the Prisoner to attend to the Indictment then to be read.

INDICTMENT

" SIR ARCHD. GORDON KINLOCH of Gilmerton, Baronet, present Prisoner in the Tolbooth of Edinburgh, You are Indicted and Accused, at the instance of ROBERT DUNDAS, Esq; of Arniston, his Majesty's Advocate, for his Majesty's interest, THAT WHEREAS, by the laws of God, the laws of this, and of every other well governed realm, MURDER, more especially when committed by a Brother against a Brother, is a crime of a most heinous nature, and severely punishable: YET TRUE IT IS, AND OF VERITY, That You, the said Sir Archibald Gordon-Kinloch, are guilty actor, or art and part, of the foresaid crime, aggravated as aforesaid; IN SO FAR AS You, the said Sir Archibald Gordon-Kinloch, being, on the 14th day of April 1795, in the house of Gilmerton, belonging to the deceased Sir Francis Kinloch of Gilmerton, Baronet, Your Brother-german, situated in the parish of Athelstonford, and county of Haddington, did, on the night of the said 14th, or early in the morning of the 15th of April 1795, or on one or other of the days or nights of that month, or of the month of March immediately preceding, or of May

immediately

Immediately following, come down from your bed-chamber in the houſe of Gilmerton aforeſaid, to the parlour or dining-room, where Your ſaid Brother then was, You having, at the time, two loaded piſtols ſome where concealed about Your clothes; and having ſoon thereafter left the ſaid parlour or dining-room, and Your ſaid Brother having followed, and being then cloſe by You, the ſaid Sir Archibald Gordon-Kinloch, on the ſtair leading to the upper apartments, You did then and there Murder the ſaid Sir Francis Kinloch, Your Brother, by wickedly and felonioufly diſcharging one of the ſaid loaded piſtols at your ſaid Brother, by which he received a mortal wound; the ball having penetrated below the point of the ſternum or breaſt-bone, towards the right ſide: And the ſaid Sir Francis Kinloch having languiſhed in great pain till the evening of the 16th of the ſaid month of April, did then expire, in conſequence of the wound given him by You the ſaid Sir Archibald Gordon-Kinloch, and notwithſtanding of every medical aſſiſtance having been procured.—And You, the ſaid Sir Archibald Gordon-Kinloch, having, upon the 30th day of May 1795, been brought before James Clerk, Eſq; Sheriff-depute of the ſhire of Edinburgh, did, in his preſence, emit a Declaration, which was ſigned by You, the ſaid Sir Archibald Gordon-Kinloch: Which Declaration, together with two ſmall pocket piſtols, having the words "H. W. Mortimer, London, Gunmaker to his Majeſty," marked on the barrel; as alſo a piſtol-ball, extracted from the body of the ſaid Sir Francis Kinloch; as alſo a certificate dated at Gilmerton the 18th of April 1795, and ſigned "James Home, Benjamin Bell, G. Somner;" alſo a letter from the deceaſed Sir Francis Kinloch to Mr Alexander Fraſer, Sheriff-clerk of Haddington, dated 15th of March 1795; another letter from the ſaid Sir Francis Kinloch to the ſaid Alexander Fraſer without a date, but marked on the back 18th March 1795; as alſo a letter from You the ſaid Sir Archibald Gordon-Kinloch, to the ſaid Alexander Fraſer, dated Haddington Jail, 22d day of April 1795; another letter from You the ſaid Sir Archibald Gordon-Kinloch to the ſaid Alexander Fraſer, dated

the

the said 22d day of April 1795; and also a letter, dated Edinburgh Jail, 24th April 1795, from You the said Sir Archibald Gordon Kinloch, to the said Alexander Fraser, will all be used in evidence against You, the said Sir Archibald Gordon-Kinloch, and will, for that purpose, be lodged in the hands of the Clerk of the High Court of Justiciary, before which you are to be tried, that you may have an opportunity of seeing the same. AT LEAST, time and place above mentioned, the said Sir Francis Kinloch of Gilmerton was Murdered, and You, the said Sir Archibald Gordon-Kinloch, are guilty actor, or art and part, of the said crime. ALL WHICH, or part thereof, being found proven by the verdict of an Assize, before the Lord Justice General, Lord Justice Clerk, and Lords Commissioners of Justiciary, You the said Sir Archibald Gordon-Kinloch, OUGHT to be punished with the pains of law, to deter others from committing the like crimes in all time coming."*

Lord Justice Clerk. Sir Archibald Gordon-Kinloch, Baronet, Are you Guilty or not Guilty?

Prisoner. Not Guilty.

After the Pannel had pled *Not Guilty*, Mr DAVID HUME, one of his Counsel, addressed the Court as follows:—

My Lord Justice Clerk,

Your Lordships have heard the plea which the pannel enters to the charge,—the grievous and too relevant charge,—which is laid in this (as I must needs admit it to be) most necessary prosecution against him. And it now remains for those who have undertaken the care of his defence, (however unequal to so important a task,) to explain to your Lordships, somewhat more fully than the pannel for himself can be expected to do, the meaning of that plea, in the particular circumstances of this case; and to point out to you the scope and object of the proof in exculpation, which is intended to be taken on his part.

In pleading not guilty to the charge, the pannel would, in the first place, be understood to intimate his denial of *that*, which the prosecutor in support of his libel has to prove, and which, if he cannot prove, he must fail in his prosecution,

* Lists of the Witnesses, cited on both sides, will be annexed.

profecution, namely, That it is He who has been the actor of the miſerable deed of ſlaughter here related;—a thing which, even if it be true, the pannel cannot confeſs, having ſcarce any knowledge or remembrance of what paſſed on the occaſion of himſelf, but from the relation of others only, which does not call for, nor would juſtify a confeſſion.

But farther, my Lord, and perhaps in this caſe ſtill more material,—if unluckily it ſhall appearand be ſhewn, that the pannel's *hand* has been the unhappy cauſe of the death of his Brother,—then, my Lord, and in that event, his plea muſt be underſtood to mean this other, equally available indeed, but far leſs fortunate defence, that at leaſt his heart and purpoſe have not been in the deed, but his hand only,—that it was not the work of malice and deſign, (without which there is no murder,) but of pure fatality and misfortune, which he could not avoid, and for which he is not the object of puniſhment, but of ſympathy and commiſeration:—Becauſe, my Lord, at the time ſtated in this Indictment, the pannel was no longer to be numbered in the rank of reaſonable and accountable beings, but by one of thoſe high and dreadful viſitations of Providence, to which we *all*, the wiſeſt and the beſt of us, are equally liable, and from which even thrones are not exempt, had been deprived of all ſelf-government,—of all regulation of his conduct, or controul of his paſſions,—of all diſcernment of friend from foe, or of that which was meant to ſerve from that which was meant to harm him,—and acted, in ſhort, under the blind impulſe of a diſtempered and furious imagination, which tranſported him whereſoever it would,—which filled him with a thouſand vain jealouſies, horrors, and apprehenſions,—and would equally have turned his hand * againſt whatſoever perſon had at that moment come in the way. This, my Lord, is the pannel's plea and main reliance.

My Lord, while I ſtate it for him, I am not ignorant of the reports and rumours that are abroad in the world; rumours, I am ſorry to ſay, which, on the very day preceding this trial, and even from the pulpit, the ſeat itſelf of truth and of charity, have, in contempt of decency and humanity,

* A miſtake in point of fact for the Sunday ſe'nnight before.

humanity, been induſtriouſly circulated to condemn him. I ſay, I am not ignorant of theſe reports, and of the weight of prejudice and ſuſpicion, with which, in conſequence, I have to ſtruggle; not indeed with your Lordſhips, whoſe breaſts are void of every feeling of the ſort, and who will liſten to nothing but the information of the law, and the ſtill voice of your own conſcience; but with the people at large, from among whom the perſons, who as Jurymen are to decide on the pannel's fate, are and muſt be taken. Nor, my Lord, do I think it very wonderful, that ſuch ſhould be their feelings on this extraordinary occaſion. My Lord, when they are told the miſerable ſtory of this event,—that a worthy and excellent gentleman,—the repreſentative of a flouriſhing and reſpected family,—juſt arrived at the poſſeſſion of his inheritance, in the courſe of nature, by the death of his aged father, (a father, in good time removed from the ſight of ſuch a ſcene among his children;)—when, my Lord, they are told that this good and eſtimable perſon, ſurrounded with all the fair proſpects of a long, a happy and an uſeful life,—that he has been taken off by a foul Murder,—a murder committed under his own roof, almoſt at his own table, and in the midſt of his domeſtics, friends and relations; and when to all this it is added, that he has fallen by the hand of his own brother, his gueſt at the time, and inmate of his houſe, by him "*who ſhould againſt the* "*Murderer ſhut the door, not fear the knife himſelf:*" No wonder, when this lamentable ſtory is related, if, in the firſt emotions of pity and of indignation at ſo ſad and ſtrange a tragedy, any thing that *can* be ſaid in defence of the unhappy author of ſo much miſchief, is heard at firſt with a cloſe heart and an unfavourable ear.

But, my Lord, how natural and how excuſeable ſoever theſe emotions, (as ſurely they are *moſt* excuſeable,) they are not, however, the juſt and proper emotions for this time and occaſion; nor is this a diſpoſition which they can be ſuffered to bring with them into the preſence of this Court of Juſtice; into which, my Lord, they are not called to aſſuage their paſſions, or indulge their feelings, with regard to an event,

event, which, however deplorable, is paſt and gone, and cannot be recalled, (I would it could;) but to try as Judges, coolly and impartially to try, nay ſcrupulouſly and tenderly to try, the manner of that calamity, whether it was of chance or of deſign, and to decide on the life and death of a frail and infirm mortal like themſelves, who if, by the will of Providence, he has truly been viſited with this grievous and ſore affliction, and has been the inſtrument of deſtroying a brother, who never did him harm, and whom he never regarded *but* as a brother, is himſelf far more to be pitied than the deceaſed, and is no object of judgement, but for that Almighty Judge whoſe hand hath ſmitten him. Theſe things, I truſt and hope in God, that all now preſent, and thoſe eſpecially who have been called to the office of Jurymen, will, as they value the intereſt of juſtice, or their own peace of mind, remember and keep in view; and that there are no bounds nor meaſure to the idle, the confident, yet falſe and groundleſs ſtories which a whole country, commenting upon one, and that ſo marvelous and intereſting a ſubject, muſt give riſe to.

My Lord, I aſk your Lordſhips pardon for juſt touching on this topic, unneceſſary I confeſs to your Lordſhips, and to which I ſhall not again recur. With reſpect to the proper buſineſs before the Court,—in ſtating the pannel's plea in the general terms I have already uſed, I have perhaps ſufficiently complied with the rule of Court, and have ſtated *that*, which you cannot *but* ſuſtain as a relevant and lawful defence. But, my Lord, from any thing I know of this caſe, I ſhall have no objection to lay the ſtate and hiſtory of the fact ſomewhat more fully before the Court; though, on the other hand, it cannot, and I know will not be expected of me, to enter into a diſquiſition concerning the nature of Madneſs, (the thing of all others the hardeſt to be deſcribed,) or that I ſhould attempt to aſcertain the peculiar claſs and character of the diſtemper, to which this unhappy man was liable.

Suffice it to ſay, that it was no ſhort, ſudden, and unaccountable fit of phrenzy, for the firſt time obſerved at the moment

moment of the ſlaughter, (though, allow me to obſerve, even this, if abſolutely and fully proved, would in law, as in reaſon, be ſufficient;) but the pannel's plea is far more favourable. Upwards of fifteen years ago, I believe in 1779, when abroad in the Weſt Indies, in the ſervice of his country as an officer, the pannel had the misfortune to be ſeized with one of thoſe dreadful fevers incident to the climates of that quarter of the world, and which raged with ſuch violence at this time, that out of 5000 men, which compoſed their little army in the iſland of St. Lucia, no fewer than 1800 were, in the courſe of a few months, ſwept away. After a long and ſevere illneſs, and by the pure ſtrength of his conſtitution, he eſcaped, my Lord, at laſt, with his life; but I cannot ſay, fortunately eſcaped, for he left the better part of him *behind*; and from thence forward was no longer the man he had been before. Not only, my Lord, was there a great alteration of the temper and humour of the man, who, from ſocial, chearful, and good humoured, became ſullen, jealous, and iraſcible, and extremely changeable and uncertain,— not only was there a decay of the vigour of his intellect—a confuſion, weakneſs, and cloudineſs of underſtanding; but there had come to be at times a plain derangement and diſorder—and this to ſuch a degree, as had on one occaſion tempted him to turn his hand againſt his own life, (as he is now charged to have done againſt his brother's;)—and this an attempt of ſo violent and ſerious a nature, (by cutting himſelf very deeply in the wriſt,) as occaſioned him a confinement of three months, before he was again fit to come abroad.

This, my Lord, had been his ſtate for years. But of late, and recently before the event which gives riſe to this trial, things had plainly been verging, (as happens with this malady,) from worſe to worſe, into abſolute inſanity and deprivation of reaſon. Of which melancholy truth, my Lord, ſo much were all about him,—ſo much was the deceaſed himſelf convinced, (not to mention the many ſtrong proofs of it that will be given you in his actions and con-

)

duct,) that every preparation had been made, the ſtrait waiſt-coat provided, a keeper engaged, and the proper attendants ſummoned to the houſe, to reduce him, by main force, into a ſtate of coercion as a *madman*, who could no longer be ſuffered to go at large.

Happy would it have been for the deceaſed, happy for the pannel, for the common friends of the family, and for the public, if this ſalutary, this neceſſary purpoſe, had with due diſpatch and reſolution been carried into effect: For to the undue delay of it, (owing, I admit, to amiable, but moſt unfortunate motives,) was the cataſtrophe owing that enſued. Had it not been for that delay, and an aukward and ill conducted attempt in the end to ſeize his perſon, at a time, when there was no force at hand to maſter him, Sir Francis Kinloch might now have been alive, and happy in the midſt of his friends;— your Lordſhips would have been ſpared this painful piece of duty;—and Sir Archibald Gordon-Kinloch, a gentleman of birth and accompliſhments, and born to happier proſpects, would not now have ſtood expoſed, a public and miſerable ſpectacle, at the bar of a Court of Juſtice, and under trial for his life.

My Lord, when I have explained the defence in theſe terms,—a ſtate of utter inſanity, at the time of the deed, and preceded by a courſe of infirmity and of occaſional derangement for years, I truſt I have laid a plea before you, which ſtands in no need of aid from caſes, books or precedents, to recommend it to the attention and favour of the Court; nor will I conſume one moment of your Lordſhips time, which, I am afraid, will at any rate be long encroached on, with the quotation of any ſuch, in ſupport of that which nature, reaſon, and humanity preſcribe.

The Court delivered their opinions, which coincided with the propoſition of Mr Hume; and the following Interlocutor was pronounced:—

"The Lord Juſtice Clerk, and Lords Commiſſioners of "Juſticiary, having conſidered the criminal libel, raiſed

" and purſued at the inſtance of Robert Dundas, Eſq; " of Arniſton, his Majeſty's Advocate, againſt the ſaid Sir " Archibald Gordon-Kinloch of Gilmerton, Baronet, they " find the libel relevant to infer the pains of law; but " allow the pannel to prove all facts and circumſtances " that may tend to exculpate him, or alleviate his guilt: " And remit the pannel, with the libel, to the knowledge " of an Aſſize."

The Jury being called, and no objection made to any of them, the following gentlemen were impannelled:—

The JURY.

1. Andrew Wauchope of Niddry Mariſchal, *Chancellor.*
2. John Wauchope of Edmonſtone.
3. George Ramſay of Whitehill.
4. Simon Fraſer of Ford.
5. Robert Trotter of Caſtlelaw.
6. John Newton of Curriehill.
7. Alexander Keith of Ravelſton.
8. George Ramſay younger of Barnton.
9. James M'Aulay druggiſt in Edinburgh.
10. Robert Sanderſon merchant there.
11. William Coulter merchant there.
12. Thomas Hutchiſon baker there.
13. John Moncrieff apothecary there.
14. Patrick Inglis merchant there.
15. Elphinſton Balfour bookſeller there, *Clerk.*

EVIDENCE for the CROWN.

1. Duncan M'Millan, writer in Edinburgh, examined by Mr Burnet.—Were you acquainted with the late Sir Francis Kinloch? I was. Do you remember, on Monday 13th of April laſt, ſeeing Major, now Sir Archibald Gordon Kinloch? Yes, I came from Edinburgh with Mr Alexander Kinloch. Do you remember of meeting a chaiſe on your road to Haddington? Yes. At what time might this be? Paſt 3 o'clock in the afternoon. Did you obſerve who was in the chaiſe? The priſoner at the bar was

in

in it. Did you observe any thing particular in his appearance? He threw himself back, as if wishing to avoid being seen. Did the chaise stop?—No.

Lord Justice Clerk. Were you going in opposite directions? Yes.

Mr Burnet. Had you any conversation with Mr Alexander Kinloch on this occasion? He expressed surprise, because he thought his brother had gone to London. Did Mr Alexander mention the day that he supposed his brother had gone to London?—No.

You passed on to Haddington? Yes, and stopped at Mrs Fairbairn's. Did you dine at Mrs Fairbairn's?—Yes. Had you any other company?—Yes, Mr George Somner, who dined with us. Did you see Major Gordon-Kinloch there?—I heard the noise of a carriage.—I looked out at the window, and observed that it was the same chaise we had met.—It stopped at Mr Somner's shop.

Did you, or any of the company, go out?—Mr Somner went out, and returned soon after, with Major Gordon-Kinloch. Had you any conversation with the Major?—Yes.—I asked him how he was.—He answered, he was very ill. Did he continue in the room with you, or did he go out? He went out and returned again. How long did you remain in Fairbairn's house, and how did the Major behave when he returned? When he came back, we pressed him to take a glass of wine and water; and he was in so bad a state, that he was not able to carry it to his head.

Did you go to Gilmerton that night? Yes.—Who went along with you? Mr Alexander Kinloch. Had you not occasion to know that another person went along with Mr Somner? Mr Somner and the pannel set out with the intention of going to Gilmerton, as they said. Did they not go forward? The chaise, in which the pannel and Mr Somner were, stopped at a place called *Carburd-tail*, about a mile from Gilmerton. We asked them why they stopped? And they said, To make water.

Lord

Lord Justice Clerk. Mr Somner made the anſwer? Yes.

Mr Burnet. What paſſed further? After they had ſtopped a conſiderable time, I aſked What detained them ſo long? and Mr Somner anſwered, That the Major had gone away.—Was a poſtilion ſent after him? One of the poſtilions was ſent to look for him: He came back, and informed us, that he had overtaken the Major, who ſaid he was going to Haddington, where he ſaid he would be found. Did you then go on to Gilmerton? Yes, we arrived there a little after ten at night. Did both chaiſes go on? Both. Do you remember of any thing being taken out of the chaiſe in which the Major was? I think there were ſome things taken out, but I was not preſent.—What happened after your arrival at Gilmerton relating to the Major? Mr Somner came into my bed-room in the morning, told me, that he was going to Haddington to look after the pannel, and deſired me to follow him as quickly as I could. You went to Hadington then? Yes, after breakfaſt, and enquired for the Major, but could get no information of him. Did you go back to Gilmerton that day? Yes, I returned before dinner. Was Sir Francis Kinloch at home? Yes; alſo Mr Alexander, Miſs Kinloch, and a Mr Low.

Do you remember any thing that happened after dinner? I remember there was a meſſage brought to me, that ſomebody wanted to ſpeak to me.—About what time was this? About half an hour after dinner.—When was dinner? We ſat down to dine about five.—Who was the perſon that wanted you? It was William Reid the gardener?—What paſſed between you? He told me that he had been up at Mr Walker's of Beanſton, and that he had ſeen the Major there, who was in a very diſagreeable ſituation indeed.—That he went up ſtairs, and knocked at the door where the pannel was.—That the pannel called out who was there, and the door was half-opened from within.—There was no body in the room but the pannel. —He had a piſtol in his hand, which alarmed Reid exceedingly.

Lord

Lord Juſtice Clerk. He had a piſtol you ſay?—Yes, my Lord.—This is all that William Reid told me.

Mr Burnet. How did you proceed? I called Sir Francis out of the room to inform him; and the pannel appeared ſoon after.—I obſerved him, before he came up to the houſe, from the window of the lobby.—Did he come into the houſe? Yes, he came into the lobby.—What converſation paſſed there? Very little.

Lord Advocate. Do you recollect any part of that converſation? His brother and I enquired how he did, and he ſaid, Very poorly.

Mr Burnet. Do you recollect where he went next? By the deſire of Sir Francis, who took him by the arm, he went to his own bed-chamber, and I returned to the dining-room. What happened next? A meſſage was ſoon after brought to Mr Low, that Sir Francis had been taken very ill, and could do no buſineſs that night; upon which Mr Alexander Kinloch left the dining-room, and went up ſtairs, and ſhortly after Mr Low went away. Had you occaſion to leave the dining-room, and go up ſtairs? Yes, to the Major's room. What converſation had you with the Major? I do not recollect. Was the Major in bed? He was lying on the bed, and part of his clothes were off. Do you recollect any converſation that paſſed? The Major ſpoke, and converſed a good deal with his brother Sir Francis; but I don't recollect the purport of the converſation. How long did you remain in the room? Not long.—I was there occaſionally.—The family went to ſupper about eleven, but the Major did not come down.—Was Sir Francis in the room? Yes.

Lord Advocate. You ſaw the pannel before at Fairbairn's, and afterwards at Gilmerton, Did he appear in a better or worſe ſituation at the latter period than at the former? He appeared a great deal calmer, from the attention of his brother Sir Francis. Do you recollect the ſubſtance of what paſſed in converſation? No. Did he hold any irrational or incoherent converſation, either in your or his brother's preſence before ſupper? I cannot ſay. Did any thing

thing pass, which impressed your mind at the time, that he was unfit to hold a rational conversation? I did not think him perfectly collected. Was he more or less collected than when you saw him at Fairbairn's? He was more collected.—From what circumstance or appearance did you form this opinion, that he was not perfectly collected? It was from his conversation.—He wandered from topic to topic.

Mr Burnet. How long did the company sit at supper? Till three in the morning.—Did any person join them? Yes, Mr George Somner. At what time did he come there? Between 10 and 11. This was before supper? It was. At what time did you go to bed? Immediately after supper. Have you occasion to know, If Sir Francis went to bed then? He left the room before I did go to bed. He had occasionally left the dining-room in order to visit the Major. Did you see him afterwards? I saw him in his bed-chamber before I went to bed. What did you say to him? I advised him to go to bed. How long were you in bed? I was waked by Mr George Somner. (*L. J. Clerk.* There was only one Mr Somner here? Yes.) What was the occasion of Mr Somner waking you? To tell me that Sir Francis was shot. Where did you go to? Straight to Sir Francis's room. In what situation did you find Sir Francis? The servants were undressing him. Did he speak to you? He told me not to mind him, for there were plenty with him; but to go and prevent his poor sister from coming into the room. Did you see any wound about Sir Francis? I saw a wound, and was desired by Mr Somner to put my hand upon it, to prevent the external air from entering. Did you prevent Miss Kinloch from entering the room? I went immediately to the door, when Sir Francis desired me, but could not prevent her from coming in. She came in, and was very much distracted. Did she remain in the room? No, we were forced to carry her out.—I returned, after seeing Miss Kinloch to her room. Were any expresses sent off? There was an express sent to Edinburgh

burgh for Doctor Monro and Mr Benjamin Bell, and another to Haddington, for Mr Richard Somner.—I then went into the room where Sir Francis was, and supported him for half an hour, while Mr George Somner was preparing bandages.

Lord Advocate. Did any converſation paſs between the deceaſed and you on the ſubject of the event that had taken place? None, only he ſaid, "God Almighty help that "poor unhappy man." Did you, in paſſing from your own apartment to that of Sir Francis, ſee the priſoner? No, I did not ſee him again. Was he not on the ſtairs, nor in the lobby? No. When did Mr Bell arrive? He came about eleven o'clock. Was Sir Francis regularly attended by medical perſons? Yes. Had you any farther converſation with Sir Francis? I had ſome little converſation, but none on the accident, or the perſon who committed it, except what I mentioned before. How long did Sir Francis ſurvive the accident? The wound was received on Wedneſday morning, and he died on Thurſday night, about eleven o'clock.—You were intimate in the family of the late Sir David Kinloch, How long did that intimacy continue? From the year 1762. Were you intimate from the year 1780 downwards? Yes.—When did Sir David die? In February laſt. Was the pannel at that time in the houſe? Yes. How long did he continue after? I cannot ſay; I went away. Did Sir Francis ever go from home at any time, and leave his brother, his ſiſter and you, at Gilmerton? Yes. I came into Edinburgh before the Seſſion roſe, and before that time, Sir Francis had gone to Edinburgh. Did you remain at Gilmerton during the time of Sir Francis's abſence? Yes. Who acted as landlord then? The Major. During any time previous to the 12th of March, Had you occaſion to obſerve any thing particular in the conduct of the priſoner? Nothing, except that he was diſſatisfied with his father's ſettlements. Does it conſiſt with your knowledge, that Sir Francis had any particular reaſon for going to Edinburgh. Yes, it was to take

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the advice of counsel on his father's settlements. Do you not know, that it was on account of the dissatisfaction that the pannel had expressed? Yes, from the time that Sir Francis left Gilmerton to go to Edinburgh, till the day that the witness left it also. Did any conversation pass on that topic? Yes. What was the tendency of that conversation? The pannel expressed his dissatisfaction in several conversations. From the year 1780 downwards, Did you observe any thing particular in the conduct of the prisoner? He was remarkable for being exceedingly troublesome when he got drink. Do you recollect any other peculiarity? He was sometimes not correct, not sane. Do you allude to the time he was in liquor or otherwise? He was confined for insanity once in Edinburgh. Do you recollect when? It was a few years ago. Is it from that circumstance, or any other, that you formed your opinion of him being insane? It is from that circumstance, together with other appearances. Of what nature were these other appearances? That of being troublesome in company; and, at a former period of life, he was one of the most mild and pleasant men in company I ever saw. Did you ever observe any appearances, when sober, which could induce you to suppose him insane? I remember once, some years ago, that he came to my bed-side, in my own house, about five in the morning, and said, he was going to set off for Greenock to see Major Mackay.

L. J. Clerk. Had he not been in town? No; he had been travelling all night. Was he sober? Yes.

Lord. Advocate. Was it from his conversation or appearance that you judged him insane? From both. Did he tell you his purpose in going to visit Major Mackay? No. Nor where he had been? Yes, at Berwick. Did you attempt to dissuade him? Yes. Did he state any reason why he was going to see Major Mackay? None. Did you take any steps in consequence of this? No. Did you ever communicate to his family the opinion you had formed? I think that I must have mentioned to Sir Francis, that I thought him insane.

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Do you know of any cauſe of enmity, or of any grudge, ſubſiſting between the pannel and his brother? His conduct when in drink was very extraordinary. Do you remember any thing more remarkable than another? I remember very high words paſſing between them, and the priſoner ſtruck Sir Francis. Did Sir Francis give any cauſe for this? He certainly was in a great paſſion. Was there any cauſe for this paſſion? The pannel had given great abuſe to a gentleman at his father's table, and Sir Francis reproved him for it. He ſtruck him with a glaſs tumbler, and wounded him upon the face. Were you preſent at the abuſe that had taken place? I was. In your opinion, was the abuſe ſuch as to juſtify Sir Francis for taking his brother to taſk? I think it was. What happened in conſequence? I carried Sir Francis up ſtairs and dreſſed him. Sir David was not informed of it then? Not for ſome time. Does it conſiſt with your knowledge, that the pannel was obliged to leave his father's houſe on account of this miſunderſtanding? I think he was. How did Sir Francis take this behaviour? He forgave him. He did not feel any reſentment.

During the laſt years of your acquaintance with the pannel, was he accuſtomed to leave the houſe ſuddenly, without warning, or telling where he was going? Yes. And did he come back, without telling where he had been? Yes. Were any ſteps taken, or propoſed to be taken to confine him? I never heard of any during all this time, till immediately before the preſent event. I mean till after Sir David's death.

Mr Burnet. Had you occaſion to know that the Major came to Edinburgh, and reſided there ſome time before his brother's death? Yes. How long before his death? A few days, and he lived in the Black Bull Inn. In what ſtate did he appear? Was he able to converſe on general ſubjects? He was. Do you remember any difference in his appearance from what you had ſeen at Gilmerton? I thought he had been living harder than uſual. Did you obſerve any other alteration? No.

Ld. Advocate. You tell us you never knew of any steps being taken to confine him? None, until I went to Haddington. When? On the Monday evening. Was that the first time? Yes. What induced the family to do this? The deranged state he was in. Were any steps actually taken? Mr Somner returned from Gilmerton to Hadington, for the purpose. Was there any preparation made in the course of Tuesday? None, till Tuesday night. The pannel came home about Six, and Mr Somner was sent for about ten; and it was proposed to secure the pannel, but Sir Francis delayed it. Who proposed it? Sir Francis himself proposed it.

DUNCAN M'MILLAN, *cross examined by Mr* HUME.—Deponed, That the pannel, when in Mrs Fairbairn's, attempted to swallow a bit of meat, and could not: That his brother Alexander assisted him to carry the glass to his head, on account of the shaking of his hand: That he was unquiet and restless; kept walking backwards and forwards through the room, and went out to the stable-yard and garden: That he seemed oppressed and unhappy, and hardly joined in the conversation: That he gave no reason for his purpose of going to Edinburgh, nor for returning to Haddington, nor for calling at Mr Somner's: That the agitation of his person, and the shaking of his hand, appeared to the deponent to arise from illness, and not from liquor: That he did not press drinking, or show any desire for it; on the contrary, drank less than others of the company; and that, of course, they would not have assisted him to carry the glass to his head, if they had thought that he had already got more than he was the better of: That Mr Somner gave directions to the hostler to look after him, as appearing to be ill and deranged, and unfit to take care of himself: That on the evening, when the pannel struck his brother, it was after supper, and the bottle had been on the table, and the party drinking from dinner to supper: That, on the evening of Tuesday the 14th, Mr Somner

ner had brought a ſtrait waiſt-coat with him to be put on the pannel, and a nurſe or keeper to attend him.

Lord Juſtice Clerk. You have deponed to various meetings with the pannel before the accident happened, Now, according to beſt of your judgement, was he in a capacity to know the difference between moral good and evil, and to know that murder was a crime? I cannot ſay. Say to the beſt of your judgment? I think he was in a capacity to judge between good and evil.

Lord Eſkgrove. Had you any reaſon to believe, that the priſoner was acquainted with the coming of the woman from Haddington? No.

Mr TROTTER, (*one of the Jury*), Did Sir Francis, after coming out of the Major's room, on the night on which the accident happened, ſpeak as if there had been any difference that night between him and the Major? No.*

GEORGE SOMNER, ſurgeon in Haddington, *examined by Mr Solicitor-General* BLAIR.

Were you well acquainted with the deceaſed Sir Francis Kinloch? Yes. Do you remember of receiving a meſſage from Gilmerton on Monday the 13th of April laſt? A meſſenger came from Miſs Kinloch, deſiring the witneſs to come immediately and ſpeak to her. I went there about one or two o'clock. What converſation paſſed betwixt Miſs Kinloch and you? It was to prevent Major Kinloch from going to Edinburgh, for ſhe thought him in a very unſettled ſtate of mind, and not fit to undertake the journey. Did you ſee the Major? I ſaw him before I ſaw Miſs Kinloch. He was in a poſt-chaiſe at the door. He ſaid he was going to town. Did he accordingly ſet out? Not immediately. I obſerved him in the chaiſe very much agitated; and, from his appearance, ſuſpected

* It was underſtood that this, and the five ſucceeding witneſſes, were to be called back, and re-examined, at the inſtance of the pannel; but their exculpatory evidence was ultimately diſpenſed with.

ſuſpected it to be on his account that Miſs Kinloch had ſent for me. What converſation had you with Miſs Kinloch? She told me that he appeared in a ſtrange ſituation; that he had come there on the Sunday, with the buckles or ſtrings out of his ſhoes. What did you ſay? I told her that, from the obſervations I had made myſelf, I concluded him perfectly mad, and that he ſhould not be allowed to go about. What were the circumſtances that made you think ſo? From the appearance of his eye, and the agitation in which he ſeemed to be. Has it been common for you to attend mad perſons? No. What farther paſſed? I went down ſtairs to try to ſtop him from going away. I told him, if he would wait till I got ſome little refreſhment, I would go with him to Haddington. This was the argument I made uſe of to induce him to come out of the chaiſe. What did he to ſay this? That he could not ſtop, as he would be too late for dinner at Edinburgh; and he accordingly ordered the poſtilion to drive on, and drove away.

After this, had you any further converſation with Miſs Kinloch? Yes. I urged the propriety and neceſſity of confining him. I told Sir Francis the ſame thing that I had told Miſs Kinloch; and he expreſſed a deſire, that I might follow the Major to Edinburgh, and take the advice of the two Doctors Homes as to what ſhould be done. Did you return to Haddington that night? Yes. And, when I returned there, I received a meſſage from Mr Alexander Kinloch and Mr M'Millan, who were at Mrs Fairbairn's, deſiring me to go there. I went there, and ſaw Mr Alexander and Mr M'Millan, and told them what had paſſed at Gilmerton. They told me, that they had met the Major going to Edinburgh. After dinner, Mr M'Millan obſerved the chaiſe in which the Major was. It was driving as if he had been coming from Edinburgh. We looked to ſee which way the chaiſe would go, and it ſtopped at my ſhop door. I went down, and aſked him to come up to Fairbairn's. He agreed to come. He ſhook hands with his brother Alexander, ſaying, he was very ill, and would never be better. He then walked about the room in great

great agitation, and ſhaking his head; and he afterwards left the room. Did his brother or any body aſk him to ſtay? We all aſked him to ſtay and take ſome dinner, and either go to Edinburgh, or return to Gilmerton. What did he ſay? He tried to eat and could not, and he ſometimes ſat on the foreſide of a bed, which happened to be in the room, but would not lie down. Did he afterwards agree to go to Gilmerton? Yes. I went in one chaiſe with him, and Mr M'Millan and Mr Alexander went in another. On our way, the pannel deſired to get out of the chaiſe. Did he give no reaſon? No. Did he return? No. I deſired one of the poſtilions to go after him. He ſaid he would not return, becauſe he was going back to Haddington. What was done then? We went on to Gilmerton. About what time did you arrive there? Between nine and ten. Did you ſtay all night? Yes. Were Sir Francis and Miſs Kinloch there? Yes. How long did you ſtay at Gilmerton? I ſtaid all night, and returned next morning.

Did you receive any meſſage from Gilmerton the next day, being Tueſday the 14th of April? Yes. I received a card from Mr M'Millan, informing me that the Major had arrived, and deſiring me to come down, and bring what was neceſſary. What did you underſtand by this? I underſtood, that it was meant to confine the Major, and that I ſhould bring a ſtrait waiſt-coat. I accordingly ſet out, and carried with me a ſtrait waiſt-coat, and ſent for a nurſe, who ſometimes attends deranged people. And you went to Gilmerton with the nurſe? Yes, and I arrived there about 10 o'clock at night. After your arrival, did you take any meaſures? I went to the Major, and found him pretty quiet in his bed room, but ſtill with the ſame wild look as the day before. Had you any converſation with Sir Francis, or any of the family, after you came? Yes. Did you tell them, that you had brought the waiſt-coat. I certainly would. They agreed in the propriety of ſecuring him. What was your reaſon for not ſecuring him? I ſpoke to the ſervants frequently,

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the butler, Miſs Kinloch's ſervant, &c. but the moſt of them were either averſe, or afraid to do it. Do you know what made them afraid to do it? No. Had you obſerved arms about the Major? No, not then.

You ſupped at Gilmerton. Did you ſee the Major? He came down to the parlour about three in the morning. He came down twice. When he came in for the firſt time, he walked about diſtractedly, and complained of a violent pain in his bowels. Had you any more converſation about the pain in his bowels? He blamed, as the cauſe, a doſe of pills which Sir Francis had given him, and which, as the witneſs underſtood from Sir Francis, were analeptic pills. This was the firſt time, he ſpoke of them? Yes. He ſaid theſe pills had done him a great deal of ill, and he believed he was poiſoned by them. I adviſed him to go to bed; upon which he left the room. Did you go up to his bed-room? No. Did he come down again? Yes. When? Soon after; within a very few minutes. Had you any converſation on that occaſion? No.

Lord Advocate. After you came with the ſtrait waiſtcoat, did you ſee the Major at any time out of his own room, before he came down to the parlour? I ſaw him once, and ſpoke to him. I ſaid he had much better not go down in the ſituation he then was in, for that Miſs Kinloch was not gone to bed. This was between one and two o'clock of Wedneſday morning; and the Major had no cloaths on, excepting his breeches and ſhirt.

Solicitor General. Tell us all that paſſed —*Witneſs*, I ſaid to him, do not go down in that ſituation. He ſaid he would go down, for he wanted to ſee Frank. I took hold of him by the arm, and ſaid ſoftly, "Dear Sir, do not go down in that ſituation." When I took hold of him by the arm, he drew a piſtol. I let go his arm. He ſaid, take care of yourſelf. At that very time, Sir Francis was coming up ſtairs. Sir Francis ſaid, "Gordon, what is the matter?" He replied, "I do not know what to do. Oh! I am ill, I cannot ſleep." Did you or Sir Francis

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ſay any thing to this? The Major went into his room; I believe Sir Francis went into him. I went down ſtairs ſoon after.

Solicitor General. You have told us that he came down twice?— *Witneſs*, Yes. This was before the firſt time. Tell us what happened the ſecond time? He came down in the very ſame diſtracted manner: He walked up and down: nobody ſpoke to him. Sir Francis went out after him, then Alexander, and then I followed. Had he all his clothes on when he came into the parlour? I do not remember. He generally had one or both his hands in his breeches pockets. The piſtol that I had ſeen, made me ſuſpect, that he had his hands in his breeches pockets holding piſtols. From what part of his clothes did he produce the piſtol when you ſaw it firſt? From his breeches pocket. When I followed them as mentioned before, and had come without the parlour door, I ſaw the flaſh of a piſtol. I was then between the parlour door and the trance. The flaſh was in the ſtair. Where was the pannel, and where was Sir Francis at this time? After ſeeing the flaſh, I was ſo confuſed, that I cannot recollect; but I heard Sir Frnacis cry he was done for. I ran up to them. They were ſtanding in the ſtair. Whether I aſſiſted in ſecuring the pannel, I do not remember; but I aſſiſted Sir Francis in going up ſtairs. After Sir Francis was carried up ſtairs, what did you ſee? I ſaw a wound about three or four inches below the breaſt-bone. When he was laid in bed, I dreſſed the wound. Did you apprehend it to be mortal? Yes. Did you or Sir Francis ſay any thing during the time you were with him? He ſaid it was madneſs in him to attempt ſecuring his brother. I ſaid, certainly it was. Was there any other aſſiſtance ſent for? Yes, Dr Monro, Mr Bell, and my brother. When did Sir Francis die? He died on the Thurſday evening, about 11 o'clock. Are you ſatisfied that the wound was the cauſe of his death; I am ſatisfied it was Did you examine the body along with the other gentlemen? Yes. Did you find the bullet? I was preſent when it was extracted. Mr Bell extracted it, while Sir Francis was alive. The

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witneſs was ſhewn a certificate of what had been obſerved in opening the body of Sir Francis after his death, and was aſked if he had ſigned this certificate? to which queſtion he anſwered in the affirmative.

Did you ſee the pannel again, or had you any converſation with him, after you went up with Sir Francis? I do not remember of ſeeing him till he was in Haddington Jail. After the piſtol was fired, I remember nothing about him. When did you ſee him? I ſaw him in Haddington Jail, on Friday the 16th of April. What converſation paſſed there? I had no particular converſation. I went up with Dr. Home, and Mr Goldie the miniſter of the pariſh. Mr Goldie ſaid, that as his brother was now dead, it fell to him to give directions as to what was to be done at Gilmerton; for, though he was accuſed of a moſt horrid crime, yet he was not yet indicted, nor tried by the laws of his country. He replied, that he was in ſuch a ſtate of mind, that he could give no directions or advice about any thing. The next thing that Mr Goldie ſaid was, that it was the opinion of lawyers, that he might, in the preſence of witneſſes, appoint Mr Fraſer and him to act for him. What anſwer did the Major make? I do not remember the anſwer; but he agreed to it. You ſaid the Major appeared in great horror: What did he ſay? He ſaid, it was a fatal day. Afterwards, Dr. Home aſked him, If he would wiſh to ſee Major Mackay and Dr. Farquharſon. He ſaid, he would be very glad to ſee them.

Lord Advocate. When Sir Francis left the parlour, immediately before the accident, did you know for what purpoſe he went? No. What was your purpoſe? Sir Francis and I agreed as to the propriety of ſecuring the Major, if he came in a ſecond time; but I did not leave the room with the intention of ſecuring him. Did you ſend for any of the out ſervants to aſſiſt in ſeizing him? I know they were ſent for. Did you know that they were diſmiſſed? No. I did not ſee any of them at the time the accident happened. When did you ſee any of them?

them? I saw them between twelve and two o'clock. I do not know that they were sent home.

Lord Justice Clerk. The last time you saw the pannel, previous to the event that took place, Is it your opinion, that he was then in such a situation, as not to distinguish moral good from evil, and not to know that murder was a crime? I cannot say. I do not know what he could distinguish. Is it your opinion? When I saw him on the Monday, and on the Tuesday, I considered him mad.

Solicitor General. Was he mad to such a degree, as not to be able to distinguish good from evil? I cannot answer the question in any other way than that I thought him perfectly mad.

The witness was ordered to withdraw.

Mr Hope. I could have wished, that a question of this nature had been allowed to come from the prosecutor, because then I might have commented upon it with greater freedom than I can do, since it has been suggested by the Court. The question, however, I think, was a proper one; and it was properly answered. The witness, after repeated interrogations, said, That he could not take upon him to tell what the pannel could distinguish; but that when he (the witness) saw him on the Monday, and on the Tuesday, he considered him mad. He says again, "I cannot answer the question otherwise, than "that I thought him *perfectly mad.*" And I must say, that, as a professional man, he could not answer it otherwise than he has done. My Lords, I am not of the witness's profession; but, as a man who has paid some attention to the human mind, and to human nature, I must repeat, that the question was answered as it ought to have been.

My Lords, I have made some observations on madmen myself. Persons in that unhappy situation are too often exposed to the impertinent visits of strangers; at least, it used to be so in London: and well I remember, when at an early period of life, led by the idle curiosity of a boy, I have gone to view the places of their confinement. But,

my Lords, I hardly ever saw a man so mad, (though lying naked, and chained, on straw,) who, if the abstract question were put,—Do you think murder a crime?—would not answer in the affirmative. Madmen, my Lords, will often talk rationally on any subject, until you come across that particular topic, which has deranged their understanding. I therefore submit, that it is not proper to press the witness for a more particular answer. Has he not said, that the pannel was *perfectly* mad? The prosecutor talks of *degrees* of madness, but there is no degree in *perfect* madness? this is already the superlative degree. And when the witness, a professional man, has declared, that he cannot answer the question otherwise, I say, that any other answer which he may give, cannot be an answer according to his conscience.

My Lords, had not the witness been a professional man, I should not have insisted so much upon the point; but as a man who, from his profession, must know something of the nature of this disease, I do repeat, he could not have answered the question in any other manner; and I do submit, that he cannot be forced to give any other answer than that which he has already given.

Lord Advocate. My Lords, I do not intend to press the witness any farther on that point. If my brother supposes that I meant to press him to make an answer contrary to his conscience,—that I meant to push him to give me a different answer from that which he has chosen to give,—he has much mistaken my meaning. When I proceeded to press him a little farther, it was only to discover what was meant under the words "perfectly mad." What I mean to press from him goes thus far, to see whether the same general question, at any particular period of time, will receive the same answer. This I contend, I am entitled to do; and I shall judge from the answers that may be given, what inference I shall draw to the Jury.

The witness was recalled.

Lord Advocate. When you saw the pannel at Mrs Fair-

Fairbairn's on the Monday, was he in such a situation as to discern good from evil, or to know that murder was a crime? I cannot say that he could not.

When you saw him next night in his own room at Gilmerton, down to the time of his appearance in the parlour, can you say, during that period, from ten at night to three in the morning, that the pannel was in a condition to discern good from evil, or to know that murder was a crime? I have not had much practice in cases of infanity; and what such persons may think, I am at a loss to say.

You have told us, that you cannot say, that, when at Fairbairn's, the pannel could not discern good from evil; and that, with regard to the second period, you have not had much practice in cases of lunacy,—very proper answers. Now, did you observe any difference in that time, and on what side lay the difference? I did not observe any difference until he came into the parlour, when he appeared worse.

Mr GEORGE SOMNER *cross examined by* Mr HUME.—Deponed, That when at Haddington, the pannel was restless, agitated, and unhappy,—could not eat,—trembled so as to need assistance in carrying a tumbler of wine and water to his head;—did not seem disposed to drink, and got no spirits there that he knows of: That the motion of returning to Gilmerton, was not the pannel's own thought, but the witness's motion.

Mr Hume. If you were carried from this room to bedlam, and there shown a lunatic in his cell; if this lunatic, on being asked, *If murder is a crime?* should answer, *Yes*, would you, on the faith of that answer, think it safe to put yourself in his power, or to venture within his reach?

Mr Somner.—I would not.

Mr Hume. May not a person be mad, and yet know his keeper or others who are much about him, and be liable to be intimidated and controuled by them.

Mr Somner. I think he may.

Mr

Mr Hume. Do you think that the pannel, on the Tuesday evening, when he came to the parlour, was in such a situation of mind as to be capable of distinguishing the good or evil intentions of those who came near him, or interfered with him? or, to be more particular, Do you think he was able to distinguish, and be thankful for the good intention of a medical person like yourself, who attended to serve and assist him, from the intention of an enemy, who should come to harm him.

Mr Somner. I do not think he could.

Mr Hume. If you had attempted to wrest the pistol from him at the top of the stair, would you have run a risk of your life?

Mr Somner. I think I would.

Mr Hume. If you had tried to seize him when Sir Francis did, or if you had been in the same position as Sir Francis was with respect to him, at the time when the pistol was fired, do you believe that you would have met with the same fate?

Mr Somner. I believe I would.

Mr Hume. Did it appear to you, that the pannel, when Sir Francis was with him, was soothed and pleased with his kindness.

Mr Somner. It did rather appear to me, that he was more quiet when Sir Francis was with him than at other times.

Mr Hume. Was he ever alone with Sir Francis in the course of the Tuesday evening.

Mr Somner. I did understand that the pannel and Sir Francis were at times in the pannel's bed-room by themselves, but I cannot positively say so from my own knowledge?

Mr Hume. In the course of the Tuesday evening, were the pannel's conduct and appearance such as to persuade you, that the advice which you had given, to have him secured and confined, was a wrong, or groundless, or unnecessary advice?

Mr Somner. No, I still thought it right.

Mr

Mr Hume. At the time when the pannel fired the piſtol, was he fully dreſſed, ſo as to be in a condition to make his eſcape if he had been ſo diſpoſed?

Mr Somner. He was not.

Lord Swinton. You ſay you brought a woman and a ſtrait waiſt-coat? Does it conſiſt with your knowledge, that the pannel was informed of this? I do not think he was informed of the waiſt-coat, but he knew of the nurſe.

Lord Advocate. I have aſked you already your opinion of his ſanity on the Monday and Tueſday. I put the ſame queſtion again. When you ſaw him in jail, did you then think him capable of diſcerning good from evil, and of knowing that murder was a crime? I thought him then ſenſible.

Mr Moncrieff, (one of the Jury.) How long have you been ſurgeon to the family of Gilmerton? Twelve years. Do you know of any hereditary diſeaſes in the family? No. Can you aſſign any cauſe for the pannel's derangement? No. Do you know whether the pannel, at any time previous to the accident, endured a remarkable degree of cold? I do not know. Do you know whether he reſiſted the taking of food? I mentioned that he would eat nothing on the Monday. Do you know whether he uſed to ſleep well? I have obſerved that he was very reſtleſs.

Do you think that the reſiſtance of cold, hunger and ſleep, affords the beſt marks of diſtinguiſhing inſanity, from caſes where it is only feigned to ſerve a particular purpoſe? I think it does.

Mr M'Aulay, (another of the Jury.) When you ſaw the pannel in the chaiſe, did he do any thing, or ſay any thing outrageous? No. Did you think him drunk? No. Do you think that drink might have produced the ſame behaviour? I never ſaw him in the ſame ſituation before. Do not you think that the paſſions of the mind, ſuch as fear, anger, revenge, jealouſy, &c. may produce temporary fits of inſanity? I think they might have put a perſon much in the ſame ſituation.

GEORGE

GEORGE DOUGLAS, *examined by* Mr BURNET.—

Were you a ſervant to Miſs Kinloch in April laſt? Yes. Do you remember any accident that happened about the 15th of that month? Yes. It happened between three and four in the morning. What accident do you allude to? I was in the butler's parlour.——I heard the report of a piſtol. Where did you go when you heard the report? I ran into the dining room, and laid hands upon Major Gordon. Did you not ſee Sir Francis before you went into the dining room? I juſt got a glance of him in paſſing. Did you ſee any piſtols? I lifted a piſtol within the dining room door. Was it loaded? No. It was empty, but appeared to have been newly diſcharged. Did you not ſee another piſtol? I received another from the poſtilion, which he ſaid he had found on Major Gordon. Was it loaded? Yes. I afterwards ſaw it drawn. (Here the witneſs was ſhewn a pair of piſtols.) Are theſe the piſtols you ſaw? Yes they are.

What did you do with Major Gordon? We laid him on the carpet, and held him down, until a woman came and put a handkerchief on his face. He then had a ſtrait waiſt-coat put upon him, and was taken up to his own room. What did he ſay to you? He cried to let him live for one hour, and he would give us L. 100 a piece. Did he ſpeak of what he had done? He aſked if his brother was dead. Do you remember any thing more? After he was bound, he aſked what we were going to do with him, if we were going to cut his throat, or ſtab him. Was he carried up to his room? He walked up. What paſſed then? He ſaid, "I have done an awful thing?" Any more? I went away. When did you ſee him again? Sometime through the day. What ſituation was he in? Did you hear him ſay any thing? He lay very quiet in his bed.

Did the pannel deſire to ſee any perſon in particular? He aſked how his ſiſter was, and wanted to ſee Mr Fraſer, but Mr Fraſer would not go near him. He aſked alſo how his brother Sir Francis was. Did you, or any body

body, mention in what situation he was? When he asked, I said he was very poorly. Did he understand the answer that was made? He seemed to be sorry. How long was he in that situation? Till Wednesday night.

When he was conveyed to Haddington Jail, who went with him? Mr Hay Smith, writer, from Haddington, accompained him in the carriage.

Did he say he was sorry for what he had done? No; but he seemed to be sorry, and sometimes appeared not to understand what was said.

GEORGE DOUGLAS, *cross examined by* Mr HUME.—Deponed, That the pannel, after being seized, said to Sir Francis's servant, *that his master had poisoned him, and that otherwise he would not have done to him what he did*: That the pannel, at the time of doing the deed, was in no condition to make his escape, having nothing on but his breeches and a great coat.

ALEXANDER CAMPBELL, *examined by* Mr BURNET.—Were you a servant at Gilmerton last April? Yes, I was postilion. Do you remember Sir Francis being wounded? Yes. At what period of the month did it happen? I do not remember the day: it was about the middle of the month. Tell us what passed? I was in the Butler's parlour, and heard the report of a pistol between three and four in the morning, and went into the dining-room, where I saw Major Gordon, and two or three servants. Did you see Sir Francis after you heard the report of the pistol? No. Did you see any pistols? Yes, I saw one in the hands of one of the lads. Did you take any pistols from the prisoner? Yes, I took one from his pocket. What pocket? He had on a great coat and breeches.—The pistol was taken out of his breeches pocket. Was it loaded? I believe it was, but cannot say for certain, as I gave it to one of the servants. (Here the witness was shewn a pistol.) Do you know that pistol? Yes. It is one of them I saw.

What

What was done with the Major after the piſtols were taken from him? There was a jacket put on him. Was he taken to his room? Yes. What did he ſay? He ſaid that he had been poiſoned by his elder brother; and that he knew he would have been ſeized, whether he had ſhot Sir Francis or not. What more? He ſaid that he would give them L.100 a-piece to let him live one hour. What farther converſation paſſed in the bed-room? Nothing more. Did you ſee him carried away? Yes, the ſame night. Who went with him? Mr Smith from Haddington.

Juryman. Did the Major offer to ſtrike you, when you ſeized him? No; he ſuffered us quietly to put on the jacket.

ALEXANDER CAMPBELL, *croſs interrogated by* Mr HUME.—Deponed, that, when the piſtol was fired, the pannel had on a great coat, breeches, ſhirt, and ſtockings, but was without his waiſtcoat, and he thinks had nothing on his feet: That he certainly had not ſhoes on; and, if he had any thing on, it was only ſlippers.

WALTER GIBSON, *examined by* Mr BURNET.—Were you ſervant to Sir Francis Kinloch? Yes. Do you remember of Sir Francis being wounded in April laſt? Yes. Do you remember at what time it happened? It was about three of a Wedneſday morning. I was in the butler's parlour, and heard the piſtol diſcharged. Did you aſſiſt in ſeizing the Major? Yes. I took a piſtol from his pocket. Was it loaded? I believe ſo. What paſſed when you bound the Major? He ſpoke a good deal while we were binding him. He called out, that he had been poiſoned by his brother. Did he ſay any thing beſides? He cried to let him alone, as he would live but one hour. Any thing more? I do not recollect. What did you do with him after he was bound? He was carried to bed.

WALTER GIBSON, *croſs examined by* Mr HUME.—Deponed, That the pannel, when he fired the piſtol, was not

not in condition to escape or leave the house, being without his shoes, and as he thinks without some of his clothes: That Sir Francis, on being told that the pannel was secured said, *Poor unhappy man.* And that Sir Francis, on the Wednesday evening, on being told that the Major was carried to Haddington, said, " *What are they going to do with him* " *there. Why dont they carry him to Edinburgh?*" but whether he meant to a goal or a madhouse he did not explain.

ALEXANDER MENIE, *examined by* Mr BURNET.——You were butler to the late Sir Francis Kinloch? Yes. You know that he was wounded in April last? Yes. Were you in his bed-room after he received the wound? Yes. When there, Did Sir Francis say any thing about the wound, or the person that had given it him? No. How long did you remain in the room? About three quarters of an hour. Were you frequently with him before he died? Yes. On these occasions, did you hear him say any thing about the pannel? No. Did you see the pannel during this time? No. I did not see him till a fortnight after.

Lord Advocate. How long have you been in this family? Nine years. Did you ever, during these nine years, hear any of the family say, that the pannel was insane? I overheard old Sir David say to a gentleman, that Gordon was just going mad again. Was the pannel in the house at the time? He was staying at Gilmerton, but was from home on a visit. Did you observe any appearances of madness about him yourself? I observed him unsettled. Were any steps, or any advice taken in the family about him? Not so far as I know. Did he continue to come about the house, and to be inthe same way as formerly? Yes.

HAY SMITH, *writer in Haddington, examined by* Mr BURNET.—

Do you remember being in the house of Gilmerton on the Wednesday night after Sir Francis was wounded? Yes.

Had you occaſion to ſee the Major? Yes. What was the occaſion of your going there? I went as a meſſenger to take him to Haddington Jail. Who accompanied the Major and you to Haddington? A ſervant.

Lord Advocate. Do you remember any thing that paſſed while on the road? The Major was in great diſtreſs, but ſaid nothing. Did any thing paſs when you got to Haddington Jail? I put him into a ſmall apartment, and went to inform the Provoſt, who ordered a better apartment. When you firſt ſaw him, Who was with him? I went up with Mr Goldie the miniſter. Did the pannel hold any converſation with you? He converſed with the miniſter. Did the anſwers, which he made to Mr Goldie, appear to you collected and rational? Yes. Do you recollect any particular topic? Not, when I was firſt in his room. At the time I went up to take him away, which was about eight in the evening, he aſked me as a lawyer, to take a proteſt againſt theſe proceedings, and then appeared very confuſed. Did you ſee him again? Yes, in Haddington Jail. How long did he remain there? Three or four days. Did he upon thoſe occaſions, when you ſaw him there, return rational anſwers? He did. Did you accompany him to Edinburgh? Yes. What converſation paſſed? About the weather. Was he rational? Yes.

BENJAMIN BELL, *Surgeon in Edinburgh, examined by Mr* BURNET.

Were you ſent for to Gilmerton on the 15th of April laſt? I was. Were you informed of the purpoſe for which you were called? I was informed at Gilmerton of the buſineſs. I was told that Sir Francis was ſhot that morning.

Lord Advocate. What paſſed when you ſaw Sir Francis? I found him lying in his bed in great diſtreſs. He had been ſhot under the breaſt-bone. Did you believe the wound to be mortal? From all the ſymptoms, I judged him to be a dying man. Did you remain in the houſe till Sir Francis died? No. I waited till ſix o'clock next morning,

morning, not thinking it neceſſary to remain longer. Are you of opinion, that the wound was the cauſe of his death? Yes.

Did Sir Francis hold any converſation with you concerning the perſon who wounded him? He never did; except aſking what was become of that *unhappy m n.*— Did he not name the perſon? No. Did Dr Monro attend? Dr Monro was ſent for along with me, but did not go. When you firſt of all examined the wound, on Wedneſday morning, did Sir Francis tell you how he had got it? I had been told, that the perſon who fired the piſtol was uppermoſt in the ſtair, and therefore, I imagined the ball might have taken an oblique direction; but Sir Francis gave me a diſtinct account of the accident, by which I underſtood, that the ball had gone right acroſs his body; and I felt it with my hand near the back bone, from whence it was extracted. Did you open the body after death? Yes, in company with Meſſ. Somners. There was a report drawn up. Would you know the report again? Yes. (Here the report of what had been remarked on opening the body of Sir Francis, was ſhewn to, and recogniſed by Mr Bell.)

How did Sir Francis deſcribe the ſituation of the perſon who ſhot him? He ſaid, he was ſtanding on the ſame ſtep of the ſtair with himſelf, and that the piſtol almoſt touched his body; and this account tallied exactly with the ſituation in which I found the ball.

Lord Juſtice Clerk. Did he name the perſon? No, he never named him.

(Here the witneſs was ſhewn the ball which he had extracted from the body of Sir Francis Kinloch. It was wrapped in a piece of paper, upon which Mr Bell had marked the initial letters of his name.)

Lord Advocate. Did you know the family of Gilmerton before this accident? Yes. I ſometimes attended the late Sir David. When you went to Gilmerton on theſe occaſions,

occaſions, did you ſee the pannel? Yes. Did you ever know, or underſtand that the priſoner was inſane? I never did.

Had you occaſion to attend the pannel ſince the 24th of May? Yes. At Mr Warrender's deſire, I have attended him in Edinburgh Jail ſince that time, twice a-week. Now, I aſk you this as a profeſſional man, Did you ever ſee, believe, or judge him to be under any degree of inſanity? I never did. He always behaved with propriety; but he appeared under great anxiety of mind, and depreſſion of ſpirits. Did he ſeem to know his ſituation? Yes.

Mr Benjamin Bell, *croſs examined by* Mr Hume.—Deponed, That he viſited the pannel twice a-week, from the 24th May,—and ſometimes remained with him from 15 to 20 minutes: That he generally ſent up previous notice of his being there: That he cannot give an opinion upon theſe his viſits, that the pannel might not be furious on the 15th of April,—nor ever that he might not ſhow ſymptons of derangement in the intervals of his viſits;—for that the ſtate of inſane perſons is liable to ſudden and unaccountable variations: That he could not pretend to know a madman by the ſtate of his pulſe, or the feeling of his ſkin; for that, though, in the beginning of inſanity, there is often fever, yet a confirmed ſtate of inſanity is not ordinarily attended with any; and that, in this, the delirium of a fever is diſtinguiſhed from that of inſanity: That madmen very often can diſtinguiſh their keeper, or others who are much about them: That in many inſtances, they are capable of diſſimulation, and ſhow cunning and contrivance to gain their ends: That one of the moſt conſtant ſymptoms of madneſs, is a jealouſy of plots and conſpiracies againſt them; and that moſt frequently the objects of theſe ſuſpicions are their beſt friends, or the perſons to whom they had been moſt attached: That the moſt certain means of diſtinguiſhing a madman, are 1*ſt*, By his actions and conduct; and,

2*dly*,

2*dly*, By the appearance of his countenance, eſpecially of his eye, which has a peculiar wildneſs: That reſtleſsneſs,—want of ſleep,—odd poſtures,—ſtrange geſtures,—and the like, are alſo among the indications of the malady: That if a perſon has been ſubject to occaſional derangement, and ſhould ſwallow a great quantity of laudanum, this, in his caſe, might be more apt to produce a furioſity of a few days, and the perſon afterwards make a quick recovery, than in the caſe of a perſon who had never been ſubject to ſuch diſorder: That the confinement, ſolitude, and quiet of a jail, would be likely means to promote and aſſiſt ſuch recovery.

Dr. ALEXANDER MONRO, *Phyſician in Edinburgh, examined by* Mr BURNET.—

Have you attended the pannel in Jail? Yes. How often have you viſited him? four different times ſince the 24th of May. What ſituation did you uſually find him in with regard to his mind? I ſaw no marks of inſanity. Did you converſe with him? I did. Did you feel his pulſe when you viſited him? Always, and I found it calm and regular.

Dr. MONRO, *croſs examined by* Mr HUME.—

Deponed, That he had paid the pannel four viſits in Jail after the 24th May. Being aſked the ſame queſtions as Mr Bell, he made the ſame anſwers in ſubſtance; and in particular, being aſked, whether madmen were more apt to be jealous of their enemies or of their friends and near connections? He anſwered, That their friends were moſt commonly the objects of their ſuſpicion, and that he thought it natural it ſhould be ſo; for as madmen were not ſenſible of their own condition, or of the neceſſity of reſtraining them, and as friends and relations were chiefly active in controuling or impoſing reſtraints on them, ſo theſe perſons irritated them, and in conſequence became the objects of reſentment. He added, that in his viſits to the pannel, which might be from 7 to 15 minutes, he

he avoided any topic that could irritate him; and that if he had remained a whole, or half a day with him, he could better have judged of his condition: And, upon the whole, That he could only give an opinion as relative to the times and occaſions when he ſaw him, and nothing more.

Lord Advocate. Did you ever, in the courſe of your practice, know a perſon who went mad for forty-eight hours, and then recovered and continued well? Never, except when the perſon had ſwallowed a great quantity of liquor, or owing to ſome adventitious cauſe.

Mr Hope. May not a perſon, who has been ſubject to fits of madneſs, become ſuddenly inſane, and recover again? He is more apt to do ſo, than a perſon who never was inſane. May not the taking of laudanum, by a perſon who has been occaſionally inſane, produce a fit of inſanity? Yes.

CHARLES HAY, *Eſq, Advocate, examined by the Solicitor-General.*—

Were you well accquainted with the late Sir Francis Kinloch? I certainly was

Did he conſult you upon any points after his father's death? He did aſk my opinion reſpecting his father's ſettlements ſometimes after his death.

Will you be ſo good as mention every thing which you remember that paſſed between Sir Francis and you upon that occaſion; and, in particular, any thing reſpecting differences which had occurred between him and the pannel.

Mr Hay, (addreſſing the Court.) My Lord, it is a delicate ſituation in which I ſtand, I am called upon to give evidence, not to facts conſiſtent with my perſonal knowledge, but to diſcloſe converſations of a confidential and private nature, that paſſed between Sir Francis Kinloch and me, not only as a friend, but in my profeſſional character of a lawyer. I ſhould therefore be glad to know from the Court,

Court, whether it is their opinion, that I am bound to give an account of these confidential conversations.

Lord Justice Clerk. Your delicacy, Mr Hay, is proper; but it is the opinion of the Court, you ought to answer the question. When called upon in such circumstances, and in a case of this importance, it is your duty to give the Court and Jury all the information in your power.

Mr Hay. From the regard I bore to Sir Francis Kinloch, I intended to go out to Gilmerton the very day after the last Winter Session rose, in order to pay my respects to him on occasion of his father Sir David Kinloch's death; but, being unwilling to put him under any restraint, I wrote to Mr Duncan M'Millan, who, I knew, was then at Gilmerton, rather than to Sir Francis himself, and desired him to let me know, whether it would be perfectly convenient for Sir Francis to receive my visit at that time. Mr M'Millan returned me an answer, that Sir Francis would be in Edinburgh before the time I proposed to be at Gilmerton, and that I would see him. Sir Francis arrived in town upon the 10th or 11th of March, and dined with me on the 12th or 13th, when he took occasion to mention, that his reason for coming to town, was to advise with his friends concerning differences which had arisen betwixt him and some of the other branches of the family, concerning his father's settlements, or rather after incidents.

Mr Burnet. Explain what were these after incidents, and with what branches of the family these differences had happened.

Mr Hay. Sir Francis told me, that after Sir David's settlements were opened, appointing him his father's general disponee, he, having got the key of the repository in which Sir David lodged his papers, observed, that Sir David had been accustomed to preserve almost every letter that he received, on matters of trivial importance, and other papers of no consequence, for which reason,

he

he desired Mr M'Millan, and Mr Frazer, sheriff-clerk of Haddington, to separate the rubbish from the material papers, and to destroy the former, which he understood that they accordingly burned, or at least great part of it. This inspired a jealousy into the mind of his brother the Major, that papers were destroyed to the prejudice of the younger branches of the family, which he communicated to his younger brother Mr Alexander; and it was on account of this misunderstanding, that Sir Francis told me, he had come to town to take my opinion and that of Mr Solicitor-General on the subject.—Sir Francis then shewed me the general disposition by his father in his favour; and, on reading it, I told him I was clearly of opinion, it was properly conceived, so that it was impossible there could be room for any dispute between him and his brothers, unless it should so happen, that the claim of legitim to the younger children was not discharged in their father's and mother's contract of marriage, in consideration of special provisions being settled on them, which I mentioned to him would probably be the case, as few contracts of marriage were entered into, at the sight of regular men of business, without a clause to that purpose. I having then explained to Sir Francis the nature and extent of the claim of legitim which would ly in this particular case, he immediately said, that the provisions settled by Sir David on the younger children, were superior to what they could claim in virtue of the legitim, even if it were not discharged; whereupon I expressed my satisfaction, that there could be no ground for any legal dispute, and it was suggested that there would be no necessity to trouble the Solicitor-General for any opinion on the case, at least till Sir Francis should have an opportunity of looking into his father's marriage-contract, which he was not then possessed of. A great deal of conversation passed upon the subject, with the exact particulars of which I cannot now charge my memory, but I am certain I have told the import of it.

Had

Had you any subsequent conversation with Sir Francis on this subject?

I called upon Sir Francis a few days thereafter at Dumbreck's hotel, where he was confined with a heavy cold. He then desired that I would give him a written opinion upon the subject of which we had formerly conversed, to be communicated to his brothers. I declined giving him a formal opinion, mentioning, that it occured to me, that a letter written, as from one friend to another, might have a better effect. Sir Francis agreed with me, and I accordingly wrote, and delivered to him out of my own hand, a letter containing my sentiments.

Mr HAY, *cross interrogated by Mr* HUME.—
Did Sir Francis afterwards mention to you, that he had communicated your letter to his brothers?

In eight or ten days thereafter, I was with Sir Francis in a mixed company, and in a whisper asked him, Whether he had shewn my letter to his brothers? To which he answered in general terms, that he had; but no farther conversation passed, and I never saw him afterwards so far as I recollect, as this was either the Saturday se'ennight, or Saturday fortnight preceding his decease.

Did Sir Francis write to you, complaining that your letter had not had the desired effect?

No, he never did.

Lord Justice Clerk. Did you understand that the difference between Sir Francis and the pannel had risen to a great height.

To a very great height indeed.

The Reverend Mr GEORGE GOLDIE, *Minister of the Gospel at Athelstoneford, examined by Mr* BURNET.——
Had you occasion to go to the house of Gilmerton soon after Sir Francis was wounded? Yes, I went there on the morning after the accident happened; I heard of it between eight and nine, and immediately went down. Did you see the Major? Yes. What passed? After I had been

ſome time in the houſe, I was made to underſtand, that Major Gordon wanted to ſee me. I accordingly went up, and found him lying bound in bed with a ſtrait waiſt-coat on, and in a very diſtracted ſtate. I aſked him how he was; he anſwered "very ill." He then aſked me to ſit down by his bed-ſide. I did ſo, and aſked him if he recollected what had paſſed? he ſaid he did. I aſked him, If he was not filled with horror at what he had done? He anſwered with a furious air, and in a low tone of voice uncommonly ſtern, "No." my own feelings were much diſtreſſed, and I exclaimed "Are you not filled with horror at the "recollection of a deed that has deſtroyed one of the wor-"thieſt of men, and beſt of brothers,—a deed, that has "thrown a family into a ſtate of diſtraction, and a whole "country into the moſt extreme miſery?" He again anſwered in the ſame tone, that what he had done was in ſelf defence. "There was," (ſaid he) "a deliberate plan to form-"ed to deſtroy me." "Who told you of that plan?" He replied, "that he knew it well." "You could know it only (ſaid I,) "from the jealouſy, or ſuſpicion of your own "mind, for the worthy man, whom you have deſtroyed, was "incapable of forming a plan againſt any human being." "I ſhall die, (ſaid he) this evening; my brother has "poiſoned me. He has given me pills, which have al-"ready deprived me of the uſe of all the lower parts of my "body." I replied, I knew nothing about pills; but, if he had got pills, they had been given him with a view to do him good, not to hurt him. Had you any further converſation? He cried, to take away the people that were about him. I believe, he meant the woman, and the man ſervant who attended him, who, he thought had a deſign to murder him; and he inſiſted upon me ſtaying with him upon that account. He ſaid, he underſtood there was no danger of Sir Francis. I anſwered, that whoever had told him ſo, had been deceiving him; for I had the beſt authority, the authority of the medical gentlemen, for ſaying, that the danger was moſt eminent, and that, in all probability his brother would be be a corpſe before evening.—

ing.—Did you see him upon any occasion in the afternoon? Yes. Towards the evening he became very outrageous, and attempted to burst asunder his bonds. He cried, that he wanted to see me; and, when I went to him, he insisted that I should use every endeavour to set him at liberty. He ordered the servants to go out of the room; for, he had something particular to say to me. I desired the servants to walk out. He then told me, that he must be put in a chair before he could communicate what he had to say to me. I told him, he could inform me of any thing very well where he was. He then told me, it was about money matters: he said, he had several hundred pounds which no body knew of, and he wanted to settle it. I told him there were men of business in the house, who might be consulted about that, and then sent to Mr Fraser and Mr Smith. When Mr Smith came into the room, he said to him, "who has a right to use me in this "tyrannical manner; is it not competent to take a pro- "test against them?" Mr Smith said, it could not be done. The Major then spoke of settling some money matters; and Mr Smith having said, it would be better to delay that business till afterwards, the Major replied, "why not now,"

"Procrastination is the thief of time."

Had you occasion to see him afterwards in Haddington Jail? Yes. What conversation passed there? I told him, that I had come at the particular desire of the friends of the family, to receive directions about the management of affairs at Gilmerton. He declined giving any directions, but left the whole to his brother Sandie. I informed him, that his brother was from home, and that the friends of the family were of opinion, that some directions were absolutely necessary in the meantime. He said, that the friends ought to do what they thought most proper. I then told him, that the friends of the family had suggested, that Mr Fraser and I should be appointed to take the management, and that they wished to have his consent; and that, if this proposal met with his approbation,

probation, I would write out, in his name, and in presence of two respectable witnesses, a power to this effect; to all which he agreed, adding, that he was in such a state, that he could not attend to any business. A power was accordingly written in presence of Dr James Home and Mr George Somner, and a clause subjoined, that, if Mr Fraser and I should meet with any difficulties, we should take the advice of gentlemen of the law.

The Reverend Mr GEORGE GOLDIE, *cross examined by* Mr HUME.—

Do you recollect what conversations you have had with the pannel since he came to Edinburgh? I have seen him frequently in Edinburgh, and occasionally mentioned to him how he had acted, and the fatal event that had taken place. His answers were various. At the times when he was correct, he expressed great regret that he had not been seized and disarmed before he committed the unlucky deed. It was not merely regret, he expressed horror at the deed, and astonishment, from what he had afterwards learned as to his situation at the time, that it had not been put out of his power to do any thing of the kind. He blamed his friends in very strong terms, for having treated him with so much lenity. Had you any conversation on the day of the accident, about an English bank bill? Yes. In the course of that day, at Gilmerton, when Mr Hay Smith was present, and it was proposed to make an inventary of the pannel's money and papers. He was asked, If he had any money in his pockets? To which he answered, he had a bill for L.30 in them. Upon searching, I told him, I could not find it. He said, he was perfectly certain of having brought it to Gilmerton the day before. I then went down stairs, and informed Mr Fraser of this circumstance. Mr Fraser said, "we know "about the bill; he gave it to William Reid the gard- "ner last night at Beanston, who gave it to Sir Francis." I returned, and told we had found it, and in what manner.

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He had no recollection of having done so; and just said, "Honest William."

Lord Advocate. How long have you been settled at Athelstoneford? Since April 1778. Is Gilmerton in the parish of Athelstoneford? Yes. You would be sometimes at Gilmerton? I had the honour to be frequently there. Of course, you would be acquainted with the family? I was well acquainted with all the family. Was the pannel at the bar frequently there during your visits? He was. Did you ever, previous to his father's death, know that the pannel was insane? Never, from my own personal knowledge or observation. Did you ever, previous to Sir David's death, hear that the family had taken any steps to confine him? I never heard of their taking any, previous to Sir David's death. Did you ever hear of the pannel being insane? Yes. I remember in June 1790, I went to Dunbar, to assist a brother minister in dispensing the Sacrament. I lodged at Mr Lorimer's, who informed me, that he had seen my friend, Major Gordon, who had behaved in a very strange manner: That he was very glad I had come, for, if he had not had the prospect of seeing me, he would certainly have written to desire me to inform the family; and he told me, that the behaviour of the Major was such, that he considered him as deranged. Did he give you any reason for that opinion? He said, that he put himself into strange attitudes, and went about the room beating his breast and head: That he ordered a chaise for Gilmerton, but in place of going to Gilmerton, he drove through Dunbar, and, as Mr Lorimer was informed, had gone to Dunse. Did you hear of any other instances? No. Did you inform any of the family of what Mr Lorimer had told you? I mentioned it to Sir Francis, who was then Mr Francis Kinloch. Since Sir David's death, did you make any observations on the pannel's behaviour? I have seen him in great depression of spirits. Did you form an opinion, that he was insane? The last time that I had the pleasure of seeing him at Gilmerton, previous to the late melancholy

choly event, was on the 28th of March. An old coachman of the family, (Peter Dickſon,) ſeeing the Major in a very diſtreſsed ſituation, had conſidered it his duty to call at the Manſe the day before, when I was from home, and ſaid, that he thought the Major ſhould not be left by himſelf. On the morning after this information, I went to Gilmerton, and found the Major walking in the avenue. He told me, that he did not know what was the matter with him; he could not ſettle in any one place, nor fix his mind on any one ſubject. I thought he was not fit to be left by himſelf; and though I had occaſion to leave him at this time, and though he did not as uſual invite me back to dinner, yet I returned, and found him walking about. Fearing he might think I intruded, I felt myſelf obliged to apologize. I ſaid, "You well think, Sir, your evil "genius haunts you to day; but I thought you would be "dull by yourſelf, and have therefore uſed the freedom "to come to dine with you." He thanked me, and ſaid he was very glad of my company. Did you obſerve any thing uncommon in his behaviour on any other occaſion? Yes. On the 12th of April, the Sunday immediately before Sir Francis's death, I ſaw a carriage ſtop oppoſite to the manſe. I immediately went out, and ſaw the Major; and, upon my aſking him, he came out of the carriage. When we came in, (we had juſt done dinner,) I aſked him if he had dined? and he ſaid he had; I ſaid that it was much earlier than his uſual hour of dinner. Suppoſing that he ſaid he had dined, with a view not to give trouble to the family, I told he could have a dinner immediately and without any trouble. He repeated, that he had already dined. I then aſked him, If he would take a glaſs of wine? He ſaid, he would juſt take what was on the table, which was toddy: he then put a ſmall quantity of ſpirits into a tumbler glaſs with water, but was ſo uncommonly agitated, that, in carrying it to his head, he ſpilt a great deal of it upon the table, and drank very little of it. He told me, he wanted to ſpeak to me privately; upon which we went into another room. When there, he

aſked

aſked me, How many children I had? This queſtion had been aſked and anſwered below ſtairs; he repeated the ſame queſtion again, and walked about the room in great agitation. I reminded him, that he had ſomething particular to ſay. Of this he took no notice, but again aſked me, How many children I had? I reminded him a ſecond time, that he ſaid he had ſomething to communicate to me. He then ſaid, he believed he ſhould not be long in this world, and that, when that event took place, it would not be the worſe for my family. I ſaid, that was the language of his preſent depreſſed ſtate of mind; and added, that at his time of life, and with a conſtitution naturally ſo vigorous, he had no reaſon to apprehend any danger of that kind, and he might hope to live many years; and I adviſed him to live regularly and quietly, inſtead of driving about as he had lately done, which tended to agitate his mind; and ſaid, that a few weeks ſpent in retirement, would reſtore him to the comfortable enjoyment of himſelf and friends. Did any thing elſe paſs? I recommended to him, to think of ſome uſeful employment, and to take the advice of his brothers and other friends on that point. In ſpeaking of his brother Sir Francis, I ſaid he was a worthy man; and the Major repeated my words, ſaying, *he was a worthy man.*

Lord Juſtice Clerk. You have mentioned a long converſation. From what paſſed betwixt you, did it appear to you, That the pannel's anſwers were incoherent and abſurd? He ſeldom made any anſwers, and his behaviour was ſuch, as to make the impreſſion on my mind, that he was very abſent. But ſuch anſwers as he did make, Were they incoherent, or foreign to the purpoſe? I cannot ſay ſo; but I formed the opinion, for the firſt time, that he was deranged, and not himſelf. Did you think him capable of judging between right and wrong? I cannot ſay but he was. Did you inform his family of what had paſſed? I did not make up my mind that night, as it was a very delicate point; but I went on Monday, and told Miſs Kinloch what I had obſerved. I begged that the moſt prudent meaſures might be taken for ſecuring

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the Major; and said, that the honour and happiness of the family was deeply concerned in this; for I was much afraid, he might commit some desperate deed. Miss Kinloch told me what directions she had given to Mr George Somner which relieved my mind, from great anxiety, which had been impressed on my mind by his behaviour the day before. Miss Kinloch had, in the meantime, sent a message, desiring to see me. Did you go of your own accord to give your opinion, or in consequence of Miss Kinloch's message? I had previously made up my mind to go, and would have gone, although the message had not been brought; but I was obliged to be from home on the Monday forenoon, and on my return in the afternoon, with the view of going to Gilmerton, I found the message had been left during my absence.

Mr Hume. When you mentioned to Sir Francis, in 1790, what you had learned from Mr Lorimer, What did he say? He was in great distress; and said, that he had got similar accounts from different people, and that he did not know how to act, or what to do. Was the pannel much affected with his father's death? Very much. He had paid particular attention to Sir David during his illness, and I never saw a son behave with greater propriety, or give stronger marks of filial affection. Did he remain at Gilmerton after his father's death? Yes. That event happened on the 19th of February last, and the pannel remained at Gilmerton, (at least chiefly,) till the end of March. Did you ever hear him express any dissatisfaction at his father's settlements? No. To me he expressed great satisfaction. In particular, I remember he frequently said, he should always have a grateful sense of his father's attention; by which I understood, he meant to express his gratitude for the annuity which his father had left him. On the Sunday, when he came to your house, Did he remain long? About three quarters of an hour. After you went up stairs, did you gather from him what business he had come upon? I never got him to tell his purpose, except that

that he thought he was soon to die, and not even that, until I had reminded him two or three times, that he had said, that he had something to communicate to me. Was his conversation connected? He spoke very little, but walked up and down in the room with great agitation, while I attempted to amuse him, by talking about common occurrences. Did he ever express to you any dissatisfaction on account of his father's papers being destroyed? No. From your knowledge of him, what was your opinion of his disposition? I used to be intimate with him: He honoured me with his confidence; and I always found him humane, warm-hearted, and generous; in particular, I had occasion to find out by accident, that he relieved a woman in great distress. The poor woman was very ill, and I felt it my duty to provide her with necessaries; but I found, upon enquiry, that the Majo had been supplying her with money, and that he had done so upon many former occasions.

ALEXANDER FRASER, *Sheriff Clerk of the County of Haddington, examined by* Mr BURNET.—

Were you in the use of doing business for Major Gordon Kinloch? Yes, I was his factor for some years on the estate of Woodhall, prior to the sale of it near ten years ago; and after the sale of it, occasionally did money business for him down to Sir David's death. After Sir David's death, Did you do business for him? He gave me a factory to uplift annual rents and annuities, which was dated on the 3d of April last.

Do you remember the day on which Sir Francis received the wound? Yes, it was on a Wednesday. Did you see the pannel since that time? I saw him on the Saturday before, in Haddington, but I never saw him since that business.

When you transacted business with the pannel, Did you think he understood what he was about? Certainly, otherwise I would no have done business for him.

Here the witness was shewn and identified a letter from

Sir Francis Kinloch to him, dated the 15th of April last, and referred to in the Indictment. It was expressed as follows: "See if you can find out the marriage contract "betwixt my father and mother, as also Lady Ashe's "contract, and send them *per* bearer, that they may be "laid before Charles Hay, along with my father's will. "If Gordon and Saunders are not pleased with his opi- "ion, they must judge for themselves."

The witness also read a copy of his answer to this letter, bearing the same date, and of the following tenor:— "Your father and mother's contract of marriage has not "been found, but the infeftment upon it, which, with "Lady Ashe's contract, and also an obligation by Sir "Thomas Ashe, and discharge by them both, making in "all four deeds, are herewith sent. I have communica- "ted your letter to both your brothers."

Mr Burnet.— Do you recollect of Sir Francis going to Edinburgh, to take the advice of counsel? Yes, I think he went on Tuesday the 10th of March. Do you recollect the reason of his journey? Sir Francis told me at Haddington, that his two brothers had found fault with their father's settlement, and on account of Sir Francis having burnt some papers. I advised him to lay his father's settlement before counsel, to know upon what grounds he stood, as the sooner he cleared matters with his brothers the better.

Which of the brothers was most dissatisfied? He told me, that Major Gordon Kinloch egged on, or stirred up the other.

Whose advice did Sir Francis take on this matter? He consulted Mr Charles Hay. The advice came in a letter. Sir Francis desired me to communicate the opinion to his brothers. I accordingly gave the letter to Mr M'Millan to be shewn to the Major and Mr Alexander Kinloch? but before I had receceived it, I had a conversation with both the brothers upon the subject, and particularly with this gentleman at the bar. The result of this conversation was communicated to Sir Francis by letter.

Here

Here the witneſs read copies of two letters from himſelf to Sir Francis, the one dated 16th and the other dated the 17th of March laſt. That of the 16th was conceived in theſe terms: "Being only this moment come "home, I have only time to inform you that from, what, "paſſed with both your brothers laſt night it is almoſt impoſſible that any diſpute can ariſe. I ſhall write more fully "to morrow."

The letter of the 17th of March was expreſſed as follows: "Having talked upon the buſineſs to the Major, "the only thing he ſtated as a claim is L. 200, which he "ſaid he was paid ſhort of the 1500. The particular "circumſtances of one of his commiſſions rendered it unneceſſary to advance the L. 200, but he ſaid, that "though that ſum of L. 200 may be ſome object to "him, yet that he never meant to have any ſerious "diſpute with you about it; ſo far from that, he is quite "ready to grant any diſcharge that ſhall be aſked of him. "He and Mr M'Millan came up this morning with Miſs "Alſton, and the Major in the frankeſt manner repeated "the ſame thing, which I told him I would immediately "communicate."

"I had a converſation alſo with Mr Alexander on Sunday night, and I am in juſtice bound to report, that he "declared his perfect readineſs to ſettle the buſineſs in "the moſt friendly manner, reprobating every idea of a "contrary nature. In a converſation afterwards with "Miſs Kinloch, ſhe informed me, that ſhe clearly pointed "out to Mr Alexander, that he had coſt a great deal "more than L. 600 to his father, ſo that he had no cauſe "to complain."

The witneſs next identified the following letter from Sir Francis to himſelf, without a date, but marked 18th March 1795 on the back, and referred to in the Indictment, viz. "I never looked on Gordon and Saunders having ſerious intentions of going to law. Their doing "ſo would be more pleaſant than talking about burning "papers, and talking nonſenſe, which can only originate "in human infirmity."

Mr

Mr Burnet.—Do you recollect having any converſation with the pannel reſpecting a paper which he ſaid he had ſigned? I remember, ſeveral years ago, he told me that he had ſigned a paper in the preſence of his father, his brother Sir Francis, Mr F. Anderſon, and Mr M'Millan, which he believed was to diſinherit him.—I told him that it was impoſſible. About a week after Sir David's death, he ſpoke to me on the ſame ſubject; but as I found arguing the matter ſeriouſly would not do with him, I thought it the better way to turn it into ridicule, and ſaid, "Sir, "the perſons that you ſay were preſent, are all alive but "your father, Why do you not proſecute and expoſe "them."

Do you commonly keep copies of the letters you write? Yes. Is that the copy of a letter which you wrote to Major Kinloch? Yes.

The witneſs then read a copy of a letter from himſelf to the pannel, dated the 21ſt of April laſt, and expreſſed thus: "As you was pleaſed lately to grant a factory to "me, and to lodge papers of value in my hands, it ap- "pears to me very proper to inform you, That in conſe- "quence of the late fatal occurence at Gilmerton, a trial "muſt take place, and to know from you if you wiſh to "retain counſel for your defence, which in that caſe ſhall "be immediately done, and alſo to know who are the "advocates and agent you wiſh to be engaged."

The witneſs then identified the two following letters from the pannel to him, *viz.*

Haddington Jail, 22d April 1795.

"Sir, I received your letter, laſt night couched in a "ſtile not like the uſual, owing as I ſuppoſe, to the late "moſt unfortunate occurrence. The reaſon of my not "ſeeing you, owing to your official capacity, I by no means "(if allowed to think,) a good one. I do not ſee any "impropriety in your coming to me once to confer on "buſineſs. If after reading this, your opinion ſhould be "ſtill the ſame, let me know; and if my meſſage was de- "livered at Gilmerton, which was given to Mr Dodds."

"Sir

" SIR, *April* 22. 1795.

" Please send me the note of Mr Dalrymple for " L. 62, 2s."

The witness next read a copy of his answer, dated the 23d of April, and of the following tenor: " I received " both your cards late last night, and not having been " informed that you was to go off this morning, I put off " answering them till about breakfast time, when I was " informed you was gone. The only thing that now " requires an answer, is your demand to get up Mr Dal- " rymple's note for L. 62, 2s. The advice I got about " your property under my charge was, to advance the " ready money for necessaries to you, and consulting " consel for your defence, if you chuse to retain any.— " I accordingly intimated to Provost Hillop, that all ne- " cessaries furnished to you should be paid; and I need " not repeat that I wrote you about retaining counsel.— " I was further advised, that I was not warranted to de- " liver up any other part of your property but by le- " gal authority; so that I cannot comply at present " with your request about Mr Dalrymple's note. At " same time, if the acceptor proposes to pay the con- " tents of it, it seems to me very proper, to take the " money, and lodge it in the hands of your bankers as " part of your property. Your message to your brother " was delivered, but he returned no answer. Mr Gol- " die said he would call."

Lord Advocate. The Gentlemen of the Jury will observe, that this letter alludes to the pannel's being removed to Edinburgh.

The witness then identified the following letter, which he had received from the pannel by post, and is referred to in the Indictment, viz.

" SIR, *Edinburgh Jail, 24th April* 1795.

" I wrote you from Haddington, requesting you " would send the promissary bill of Mr Dalrymple of " sixty-

" fixty-two pounds, two ſhillings. I do not mean that it " ſhould appear againſt him."

Lord Advocate. You have known this gentleman ſeveral years. Did you ever imagine he was inſane? I have ſometimes obſerved him peeviſh and diſcontentd; but I never ſaw any marks of inſanity in his appearance, till Monday the 13th of April laſt, when it occurred to me, from the recollection of ſome circumſtances in his behaviour on Saturday the 11th, (on which day I had ſeen him at Haddington,) that the ſtate of mind in which he then appeared to be, had been in its progreſs on the Saturday.—What ſtate of mind did you think him in on the Monday? Downright mad; that is, he appeared to be deranged, or as if the rational powers of his mind had left him; and Sir Francis thought the ſame. Did you, ſuch being your opinion, Propoſe ſecuring the pannel? Yes, I did. What reaſon had you for believing him deranged? His wild appearance and behaviour. I ſhould have mentioned, that I was on my road to Gilmerton on the Monday, when a ſervant met me, and put into my hands a letter from Sir Francis, which began with theſe words: " I am ſorry to " inform you, that Gordon is ſtark mad;" and Sir Francis added, that George Somner had been ſent for, on account of the Major having told Miſs Kinloch, that he had ſwallowed poiſon, though, whether the caſe was ſo or not, Sir Francis could not ſay. Have you that card? No. What became of it? It was torn in pieces, and committed to the flames. Sir Francis and a Mr Low, (who happened to be at Gilmerton at the time,) having walked out, I was left with no other company than the Major, whoſe behaviour, as he both ſpoke and acted in a moſt extravagant manner, rather alarmed me. At one time, he brought into the parlour a blunderbuſs, with which walked he up and down the parlour, making many wild motions, and ſometimes holding it in the poſition of preſenting; and I had occaſion to ſee him put a flint into it, prime it, and load it with powder. At length, to my great ſatisfaction, he carried it out, and placed it in a chaiſe

chaise which was waiting for him at the door, and in which he left Gilmerton. But while we were together by ourselves, as already mentioned, I happened inadvertently to take Sir Francis's letter out of my pocket, and observing the Major coming towards me, and being affraid he would see it, I tore it in pieces, and committed it to the flames; and indeed I thought it a lucky circumstance, that he did not see it.

Did the pannel appear much agitated upon this occasion? He loaded the blunderbuss with great difficulty. His hands shook in a most extraordinary manner.

ALEXANDER FRASER, *cross examined by* Mr HUME.—Did it appear to you, that all risk of disagreement between Sir Francis and the pannel was over, after the conversation you had with him? It appeared to me that all differences was at an end, and it gave me great satisfaction. What was Sir David's settlement? The sum he left to each of the younger brothers was L. 1500.—Mr Alexander got only L. 900; but Miss Kinloch explained to him, that he had cost his father a great deal more than the other L. 600, and he was satisfied.

Had you any conversation with the pannel about the renunnciation which he supposed he had signed? I had; it appeared to me, that this opinion of his was wild and absurd.

When you were alone with the pannel on the Monday, in the parlour of Gilmerton house, Did you conceive yourself to be in danger? I felt myself in a very disagreeable and dangerous situation. Did Miss Kinloch give you any information of his behaviour on the preceding night?

Here the witness looked at some notes which he said had taken in his calmer moments, after he was informed by some of the gentlemen in Court, that he was likely to be called upon to give evidence in this trial. He then proceeded as follows, reading from the notes.

When I arrived at Gilmerton, Miss Kinloch was in the parlour, and soon called me to the lobby, and informed me, that they had been much disturbed and disconcerted

certed, and even alrmed by the Major's conduct the preceeding night; that he had been very reſtleſs, having gone from room to room, throwing himſelf upon the beds. She reflected upon his drinking too much brandy and gin ſaid preteeding night, and ſhe alſo informed me, that he had told her he had ſwallowed poiſon.

Lord Advocate. I muſt object to this mode of proceeding. There can be no objection to a witneſs refreſhing his memory from notes, before he comes into Court; but he is not to prepare a paper, then come to the foot of this table, and read his narrative from beginning to end, and then to go away. That, I ſay, cannot be admitted as evidence.

Lord Eſkgrove, ſignified that he agreed in opinion with the Lord Advocate.

The witneſs was ordered to withdraw.

Mr Hope. My Lord, I truſt I know ſomething of law, and have ſome idea of common ſenſe and reaſon; and I believe, I know ſomething of the law of evidence alſo.

My Lord I admit, that if a witneſs were to take from his pocket a paper, lay it on the table, and ſay there is my evidence, and then walk away, ſuch a proceeding could never be permitted by your Lordſhips; but the caſe is very different, when a witneſs, after an affair has happened, who becauſe he was not preſent at the accident, could not know or ſuſpect that he was to be a witneſs, takes down notes as ſoon as he is informed that he is to be called upon, and looks at them here, to aſſiſt his recollection on a ſpecific queſtion being put to him.

When I undertook the defence of the pannel, I felt it my duty to inveſtigate the matter to the bottom, and to diſcover every thing that the witneſſes could ſay. In the courſe of my enquiries at Haddington, I ſaw Mr Fraſer, who told me ſeveral very material circumſtances. I went to Gilmerton to ſee what could be made out from the information of the family, and there it was that I learned from the ſervants that Mr Fraſer had been there the day before the accident happened. When I came back to him

next

next morning he had been recollecting in his bed, and now remembered a number of circumstances that had escaped his memory on the day before. Then said I, " Mr Fra-" ser, put down in writing all that you remember, as " each circumstance occurs to your recollection for as " you did not recollect these things last night, it is pro-" bable that you may not recollect them when you come " before the Court, concerned and agitated as you may " be."

Now, my Lord, was there any thing improper in this?

Court. No.

Mr Hope. Then is not the witness bound, by the obligation of the oath which he has taken, to look at his notes; for that oath requires him, not only to tell what he recollects, but all that he knows or shall be asked at him. If therefore, a witness is conscious that things may have escaped his memory, he is bound to resort to any means that can render him more accurate.

If a witness takes down notes at the time an affair happens, he is always allowed to resort to them to refresh his memory. The case is the same with a person who takes notes the moment he is told, that he is to be called as a witness. The notes are the best evidence he can bring, and he is equally entitled to use them.

Had it been, as the Lord Advocate said, to read a paper from beginning to end, and then go away, the matter would have been very different indeed; but, my Lords, it was but on one question that the witness had recourse to his notes, And how does the Lord Advocate know that he is to use them any more? I say, in law, in reason, and in justice, he is entitled to use them when his recollection fails. I do not desire, that he shall read his paper from beginning to end, but only that he shall be at liberty to use it occasionally to refresh his memory. And I say, with submission, but at the same time with some degree of confidence, that the judgement of the Court cannot be otherwise.

Lord Advocate.—For all that I have heard, I still feel it

my duty to ſtate the contrary opinion. My brother miſunderſtood my meaning, if he thought I imputed to him any thing improper in the activity and zeal he has ſhewn in this cauſe, much leſs do I care whether the paper was read from beginning to end, or partially. I can have but one deſire, in common with the Jury, the due adminiſtration of Juſtice. But, my Lord, I repeat again, that my objection is well founded.

If, in the courſe of examining any witneſs, he ſhall find himſelf at a loſs, and deſires to conſult notes taken on the ſpot, and at the very time a tranſaction happened, I ſay it is competent for a witneſs ſo to refreſh his memory: But it is not ſo with notes taken at a diſtance of time: they muſt be taken immediately, becauſe it may be in the power of a witneſs, by the means of ſuch notes, to make up ſo connected a ſtory, that I defy the counſel on either ſide to make out the fraud.

I am far from ſaying, that this witneſs has any ſuch deſign. I am far from ſuppoſing that the gentlemen, who conduct this trial, could take any unfair advantage; but, as public proſecutor, it is my duty to prevent the eſtabliſhment of any bad precedent. What has been done in this caſe, may be done in others, by low attornies; not by counſel,—I cannot ſuppoſe it of them.

I agree to this, that in general, if a witneſs does not recollect, he may look at notes taken at the time. But I demand of the Court, if notes taken at a diſtance of time, ought to be admitted in evidence. I aſk you to judge. I am bound to obey;—and to that judgement I always ſubmit with pleaſure.

I ſhall only add, that it was held in the trial of Mr Horne Took, that notes taken at a diſtance of time could not be uſed by a witneſs. The point was long and ably contended by both ſides of the bar, and at laſt decided againſt the admiſſion.

Lord Eſkgrove. There are certain rules which we ſhould never relax. If a man comes to this bar as a witneſs, he is to ſwear to what he now remembers, not to what he formerly

ly remembered. How would it anſwer, were we to ſuffer the public proſecutor to produce the declaration emitted by a witneſs in his precognition before the Sheriff, and ſay to him, "there is a paper which you have ſigned, read it over, and give it as your evidence."

A man who has been preſent at any intereſting occaſion, when he expects to be called upon as a witneſs, may take notes, and produce them in Court; but this is very different indeed from a narrative taken at the diſtance of weeks.

I can make no deviation from a general rule, and therefore, I am decidedly of opinion, that the witneſs is not entitled to uſe theſe notes.

Lord Swinton. A witneſs may make uſe of notes taken down at the time an affair happens, but not when taken down weeks afterwards. There would be no harm in the witneſs looking them over before he came in here, but to take them out here, is againſt all rules.

Lord Dunſinnan agreed with the above Judges.

Lord Craig thought the witneſs might have recourſe to his notes, when any particular queſtion was put to him.

Lord Juſtice Clerk. I do not know, my Lords, that we would differ much, if we knew what we were debating about.

That a witneſs is not allowed to take out a paper, read it over, and then ſay, there is my evidence, this I allow; but it is admitted by your Lordſhips,—it is admitted by the Lord Advocate,—that a witneſs may make uſe of notes taken at the time the fact happened. Now, where is the difference, though they are taken *ex poſt facto*, if he is ready to ſwear that he took them down with a good recollection. I therefore think, that if the witneſs does not recollect any circumſtance, he has a right to look at his notes before he anſwers the queſtion, and then, if he ſays upon the great oath which he has taken, that theſe are facts, they ought to be received in evidence,—not indeed giving the notes as his depoſition, but uſing them only for the purpoſe of refreſhing his memory.

Mr

Mr Hope. Your Lordſhip muſt know, that that was all I aſked.

The Court decided by a majority, that the witneſs was not entitled to look at the notes.

The witneſs was then recalled, and informed, that it was the judgement of the Court, that he muſt not take out his notes; after which, the examination proceeded.

Mr Hume. Did you mention the opinion you had formed of the pannel to any of the family? I told Miſs Kinloch that it was my opinion, that matters were now arrived at that criſis, to make it neceſſary to confine him. Before you gave that opinion, had you ſeen the Major? No, but after ſeeing him, I was confirmed in this opinion, and thought he was actually dangerous to mankind. I imagined that he would do miſchief to ſome perſon or another; and I thought it, in particular, very dangerous for Sir Francis, as one who was going near him, eſpecially after ſeeing him prepare deſtructive weapons, having never obſerved any tendency of that kind before.

Had you any converſation with Sir Francis on the Monday? Sir Francis ſent for me to the garden. I was at that time ſtanding with the pannel in the front of Gilmerton houſe; and he ſaid, "Why go to the garden? Let "Sir Francis come to you." I replied, "I will go to Sir Francis wherever he calls me." What was the tenor of the converſation you had with Sir Francis? Sir Francis was exceedingly vexed, and ſeemed to be affronted at his brother's ſituation. He ſeemed *affronted*, did you ſay? Yes, he appeared to me to feel, as it were, a ſort of *family affront*. Was this before the blunderbuſs ſcene?—It was. What further converſation had you? A good deal more converſation paſſed between Sir Francis and me. What paſſed after Mr Somner and you were together? Mr Somner and I, in our converſation, agreed that the Major was deranged; and I afterwards informed Sir Francis of the blunderbuſs and other circumſtances, and preſſed upon Sir Francis the neceſſity there was for ſecuring him, as he appeared to me a moſt dangerous perſon, particularly

particularly about that family. Sir Francis seemed to be of the same opinion; and he then informed me, that he had bolted his room-door in the inside on the Sunday night; and I agreed that he was very right in so doing.

Had you any transactions formerly, which led you to suspect that the Major was insane? The Major was owing a debt to a Mr Hepburn, a neighbouring farmer. In May 1789, he left for me with a Mr Veitch, a draft for a sum of money to pay this farmer. When I looked at the draft, it appeared to be for about L. 100 more than was due. But perhaps I had better read the correspondence that passed at the time.—Here the witness read the following correspondence between the pannel and himself, viz.

Card Mr KINLOCH *to* Mr FRASER, *no date, quoted by Mr Fraser 7th May* 1789.

Mr G. Kinloch's compliments to Mr Fraser, and incloses him a draft for L. 430 on Mansfield, Ramsay and Co. for the discharge of his bond to Mr Hepburn, and which he has requested of Mr Veitch to give him on his arrival from Pencaitland.

Card Mr FRASER *to* Mr KINLOCH, *8th May* 1789.

A. F. presents very respectful compliments to Mr G. Kinloch, acknowledging receipt of his favour, inclosing a draft to Mr Hepburn for L. 430. But Mr G. K. will please recollect, that the principal sum due to Mr Hepburn is only L. 300, bearing interest from Lammas 1787. And as Mr H. was told, on the 17th March last, that he should be paid at three months from that date, so the whole sum due to him, upon the 17th June next, will be only L. 328 : 2 : 6. And therefore, the neat way of settling the business appears to be, to draw a bill upon Mess. Mansfield and Co. *for that sum*, payable to Mr Hepburn upon the 17th June.

The

The draft for the L. 430 shall be returned to Mr G. K. when A. Fraser shall know with certainty where to address to him.

Card Mr FRASER *to* Mr KINLOCH, 30*th May* 1789.

A. Fraser's most respectful compliments to Mr G.K. hopes the letter of the 8th of May has come safe to hand, though it lay in the post-office at Edinburgh until it was forwarded to Moffat by directions from A. F. Begs leave to inform Mr G. K. that Mr Kinloch wishes to pay up the amount of his note of hand, and interest due upon it, and offered the money to A. F. provided the amount could be ascertained; but as neither Mr Kinloch or A. Fraser could exactly recollect the sum, and the period since the interest begun to become due upon it, so Mr G. H. will be pleased to send the note of hand to A. F. and the contents of it, (including principal and interest,) may be credited in part of Mr Hepburn's debt; and in that case, Mr G. K need only send a new bill for the balance that would remain due to Mr Hepburn, after deduction of the sum of Mr Kinloch's note.

A. F. has taken the liberty to propose settling the business in the manner above stated, as he believes it to be the most easy and convenient way of doing it. And he will send the bill for L. 430 to Mr G. K. whenever he will receive his instructions for that purpose.

Card Mr G. KINLOCH *to* Mr FRASER, 2*d June* 1789.

Mr G. Kinloch's compliments to Mr Fraser, and as the the plan pointed out to him for clearing all accounts, appears to be the most proper, he has sent the note, amounting with interest to L. 70, which deducted from L. 328, amounts to L. 258, which will clear his debt to Mr Hepburn; and for which purpose, he has sent him an order on Mess. Mansfield, payable to Mr Hepburn at 14 days after date; and requests of Mr Fraser to send the note given for L. 330 to Moffat.

P. S. In reading over Mr F's. card, there is a mistake in

in the ſum due to Mr Hepburn, being at moſt L. 330, inſtead of L. 430, as ſpecified by him.

Card Mr FRASER *to* Mr KINLOCH, *4th June* 1789.

A. Fraſer's compliments to Mr G. K. acknowledging receipt of his favour, with Mr Kinloch's note of hand, and draft for L. 258, amounting in all to L 328, which will pay up Mr Hepburn's debt.

Returns incloſed the draft for the L. 430, and is ſorry that he ſhould have called Mr Hepburn's debt L. 430 in place of L. 330, and of this miſtake he had not the ſmalleſt recollection.

Mr G. K. will pleaſe acknowledge receipt of the draught for L. 430.

A. F. ſent a meſſage lately to Adam Mitchell about the balance of the wood money, but he has returned no anſwer. A. F. thinks, that without diſtreſſing Mitchell, ſome part of this balance may be recovered, indeed Mitchell ſaid ſo himſelf.

Mr KINLOCH *to* Mr FRASER, *20th June* 1789, MOFFAT.

I was favoured with your letter, incloſing my draft to Mr Hepburn for L. 430. I muſt, and do confeſs myſelf to have been much miſtaken in ſaying that you ſtated my debt to Mr Hepburn to have amounted to that ſum, but it was entirely owing to myſelf, in giving a draft for L. 100 more, which eſcaped my memory.

Mr Hume. How was the matter ſettled at laſt? It was finally ſettled in the way I recommended, by a note for the net ſum due being ſent to me.

Did the pannel after the matter was ſo ſettled, ever recur to the ſubject? Yes, at the diſtance of ſeveral years. In May 1793, when I happened to be at Gilmerton, the Major took me aſide, and told me very abruptly, that he could not recollect that a draft or bill which he had left with Mr James Veitch, to be given to me, had ever been returned; or expreſſed himſelf to this purpoſe, and added, that this circumſtance had given him very great vexation,

ation, and more than he could tell. To this I answered, that I was astonished at what he mentioned; for I was fully convinced, that no such inaccuracy or mistake had happened on the part of Mr Veitch, who was then no more; and as for myself, that I was sure that I was perfectly clear, and would be able, on looking over my correspondence on the business, to explain it in the most satisfactory manner. Did you accordingly give such information? Yes, on going home, I examined the correspondence already recited, and wrote a card to the pannel, recapitulating the import of it. This card was dated on the 20th of May 1793. Did this explanation satisfy the Major? Yes, I had occasion to be at Gilmerton soon after, when the subject was introduced; and the Major not only declared his perfect satisfaction with the explanation, but seemed much ashamed, and hurt at the want of recollection on his part, which had rendered it necessary; adding, according to the best of my recollection, that, at the time the said money transaction took place, he had been much *distracted in his mind*. Did you not, some years ago, receive a letter from the Major, dated at London, which induced you to suppose his mind at that time very much disturbed? Yes, its contents were so strange as to impress me with the idea, that he was in a desperate situation, both as to his mind and purse. What became of this letter? It having occurred to me, that the same should be immediately communicated to the family, I sent it to Mr Alexander, requesting, that he might show it to the late Sir Francis. Was it returned to you? No. I sometime afterwards asked Mr Alexander, if he had received it, and he acknowledged that he had; but nothing farther, to the best of my recollection, passed on the subject. Do you recollect having any conversation with Sir Francis respecting the pannel, soon after Sir David's death, in which Sir Francis expressed an apprehension with respect to the pannel's situation? Yes, soon after his father's funeral, Sir Francis said to me, that he thought Gordon was getting into one of his unlucky fits.

Mr

Mr Hope. I believe the pannel's pocket book is in your cuſtody? Yes.

(The contents of the pocket book were exhibited by the witneſs.)

Mr Hope. Was there found in that pocket book, a copy, holograph of the pannel, of a letter to Mr Francis Anderſon, on the ſubject of the ſuppoſed renunciation already mentioned? Yes, here it is.

Mr Hope. You have ſeen, gentlemen of the Jury, that twice over, at the diſtance of years, the pannel ſpoke to the witneſs of this renunciation; and, with this vagary ſtill in his head, he actually wrote to Mr Anderſon on the 17th December 1792, a letter, the contents of which you ſhall now hear.

Mr Hope then read the copy of the letter, which was of the following tenor: "As I am now winding up matters, and being ignorant of ſome things in which delicacy prevents me from aſking my father, and in which you can reſolve me, I now addreſs you for that purpoſe. It is to know the tenor of theſe ſheets of paper, which I ſigned in your preſence here in the year 1788, of the contents of which I was and am ignorant. Though it may appear extraordinary, that I ſubſcribed to that, of which I did not know the purport, yet that ſurpriſe will ceaſe, when ſaid at the deſire of a father, to which refuſal I ever was a ſtranger, it was done. In my requeſt of favour of anſwer, I hope there is nothing unbecoming honour and buſineſs. In this idea I ſubſcribe myſelf."

Mr Hope. Have you Mr Anderſon's anſwer to this letter? Yes, it is likewiſe here. Do you know this to be Mr Anderſon's hand writing? Yes. What is the date of this anſwer? It has none, but refers to that of the pannel's letter.

Here it was mentioned, that in caſe this ſhould be thought neceſſary, Mr Anderſon had been cited for the purpoſe of authenticating his letter, but the Lord Advocate agreed that this was unneceſſary; and the letter was then read being expreſſed as follows: "I am this day favoured

yours with yours of yesterday, and should be happy were it in my power to satisfy you, but I have not the most distant recollection of any papers you signed in my presence, in the year 1788. I observe from our books, that all transactions with regard to your sale to Lord Wemyss of Woodhall, was finally closed at Whitsunday 1786, and the balance paid you on 27th May 1786. Since which there has been no transaction betwixt us. Will you make my best respects to Sir David, and tell him, he may depend on seeing me early in the next year. And I shall be happy, if, from any circumstance you can bring to my recollection, any thing that may tend to satisfy you as to what you wish to know; but this I am certain of, that I never presented any paper to any person to sign in my life, without explaining the nature of it to them, and making them read it. My best wishes ever attend you all."

HUGH DODDS, *Clerk to Mr Fraser, examined by* Mr BURNET.—

Did you see the pannel in Haddington Jail? Yes. I saw him there on Wednesday the 15th of April, in company with Mr Hay Smith. What conversation then passed? Nothing particular; only the pannel expressed some dissatisfaction with his situation, there being no fire in the room.

When did you again see the pannel? I waited on him with a written message from Mr Fraser, in answer to several massages from the pannel. What was the import of this message? It informed the pannel, that he might give any message to me which he might have occasion to send on business; and he would get an immediate answer. What did the pannel say, on receiving this message? He said, that he supposed he might understand he was never to see Mr Fraser again; and that he could not get a distinct answer, unless he saw Mr Fraser himself.

Did you again see the pannel? Yes, on the Tuesday thereafter. What was the occasion of your seeing him then?

then? To be present at the intimation of a petition for appointing managers to the estate of Gilmerton. What passed? The pannel read over the petition, and (on my explaining the nature of it,) said, he had no objection to it, and signed a consent, which I wrote out. Did any thing further pass? Yes; he proposed to keep the petition, and to consider of the matter for forty-eight hours; but I declined leaving the petition with him, and, at his desire, scored out the consent. Did he, notwithstanding, agree to the application? Yes, before I went away, he desired another consent to be written out, and signed it.

Lord Justice Clerk. When you had occasion to see the pannel, did he speak rationally and coherently? Yes.

Lord Advocate. There are a variety of witnesses whom I have not brought forward, and I do not intend to bring forward.

As for one witness, the first in the list annexed to the Indictment, namely, Mr Alexander Kinloch, the Jury may have expected to see him here; but after the evidence which has been adduced, I am not disposed, and consider it unnecessary to put that gentleman upon so very disagreeable a piece of duty.

As to the other witnesses in the list annexed to the Indictment, if there are any of them whom my brother wishes to bring forward in exculpation, it will be competent for him to call upon them. But, on the declaration which the pannel emitted before the Sheriff being read, I here close the evidence upon the part of the Crown.

The counsel for the pannel having admitted the identity of the Declaration, the same was then read. It was expressed in the following terms:—

DECLARATION.

"At Edinburgh, the 30th day of May 1795 years. "The which day, compeared in presence of James Clerk, "Esq; Advocate, his Majesty's Sheriff-depute of the Shire "of Edinburgh, Sir Archibald Gordon-Kinloch of Gil-

mer-

" merton, who being examined by the Sheriff, and being
" informed by the Sheriff of the reaſon of his be-
" ing brought before him, and having likewiſe acquaint-
" ed him, that it was in his option, either to refuſe to
" anſwer thoſe queſtions that might be put to him, or to
" return ſuch anſwers as to him might ſeem beſt, he
" anſwered, That there was no queſtion could be put to
" him, but what he was ready to anſwer in the face of
" Heaven:—And being interrogated, If he recollects
" what happened at Gilmerton on the 15th of April laſt?
" declares, That he has a very indiſtinct recollection of
" what then happened, as he was then quite deranged.
" Interrogated, If he recollects having fired a piſtol on
" the morning of that day, and at whom? Declares, That
" he has a very confuſed recollection of it, but does think
" he fired a piſtol; but where, how, or at whom, he does
" not recollect; and that he was in ſuch a ſtate of de-
" rangement, that he is now convinced, that he would
" have fired the piſtol at any perſon that then came in
" his way. Interrogated, as the declarant now appears
" to conſider himſelf in a ſettled ſtate of mind, and
" recollects what has happened, he is deſired to
" ſay at what period his derangement ceaſed? De-
" clares, That he cannot ſay when he recovered
" from his deranged ſtate, but that he has been
" greatly better ſince he has been brought to Edinburgh,
" although ſtill at times, when particular thoughts come
" acroſs him, he feels a temporary derangement. Inter-
" rogated, If he is ſenſible at what time his derange-
" ment commenced? Declares, That he cannot ſay; but
" he felt it coming on for ſometime before the unfortu-
" tunate accident happened. Interrogated, If he was
" ſatisfied with his father's ſettlements? Declares, He
" was ſo, and never expreſſed any diſſatisfation at them,
" but was grateful for them. Interrogated, If he ever
" complained of any papers of his father's having been
" burned after his father's death? Declares, He does not
" recollect of having done ſo. All this he declares to be
" truth. Emitted alſo in preſence of Mr William Scot,

" Pro-

" Procurator-fiscal of the county of Edinburgh, Joseph " Mack writer in Edinburgh, and William Stephens " Sheriff-officer in Edinburgh; and read over to, and ad- " hered to by the declarant."

EXCULPATORY PROOF.

Lieut. Colonel SAMUEL TWENTYMAN *examined by* Mr HUME. —Are you acquainted with the pannel, Sir Archibald Gordon Kinloch? Yes.

At what time, and on what occasion did your acquaintance commence? In the year 1778, Sir A. was a Captain in the 65th Regiment, I a Lieutenant in the 18th at that period; the two regiments were encamped at Coxheath, and in the same Brigade. This circumstance naturally produced a frequent intercourse between the officers of the two regiments, and I then became acquainted with Sir Archibald. In what estimation was the pannel then held? I can affirm, that no officer was more universally esteemed and beloved than he was throughout the whole line, by both officers and men; his generosity, good temper, sociability, and general good conduct, made him very popular both in his own and other regiments.

Had you afterwards any opportunity of being still more intimately acquainted with the pannel? In the year following, I was nominated by the late Duke of Ancaster to a company in the Regiment his grace was then raising; and on the much lamented death of that amiable young nobleman, Sir A. succeeded him as Major. This, by placing us both in the same regiment, gave me an opportunity of observing Sir A. more minutely; and having sailed with him in the same ship part of the way to the West Indies, that opportunity was encreased: I can only repeat what I have

said

ſaid in regard to his general character; and in all thoſe different ſituations, I found him friendly, liberal, ſociable and humane, poſſeſſing every good and gentlemanly quality.

At what iſland were you landed? We were landed at St. Lucia, and their ſtationed. Was not the pannel ſeized with a fever at St Lucia, and what were its effects? On that iſland Sir Archibald was ſeized with a moſt malignant fever, which deprived him of his ſenſes. I have ſeen him in his bed in the higheſt ſtate of delirium, held down in his cot by a ſoldier on each ſide, and, to uſe a common phraſe, raving mad. I had ſeveral opportunites of ſeeing him while he remained on that iſland, and while he laboured under that dreadful malady; and I have frequently been preſent when he was talking of me, and did not know I was there.

Do you recollect Whether the pannel was removed to a different iſland, who accompanied him, and any occurrences on the voyage? It being thought adviſeable to have him removed to Barbadoes for change of air, as the only poſſible means left of ſaving his life, Lieutenant Fawcett, who all along kindly attended him, requeſted me to permit him to accompany Sir A. to Barbadoes, which in courſe I granted. During the paſſage, Sir Archibald's ſervant caught the fever, attended with the ſame ſymptoms, and, in one of the paroxiſms of it, threw himſelf overboard, and was drowned.' I have had ſeveral converſations with Lieutenat Fawcett upon this ſubject, after our return to England, and he was of the ſame opinion with myſelf, in regard to the decided derangement of Sir Archibald's intellects, undoubtedly the effects of this fever. Lieutenant Fawcett is now in India.

On the pannel's return to Europe, did you remark any change upon him? I was myſelf particularly ſtruck with the manifeſt change I perceived in Sir Archibald, on my firſt ſeeing him in England, after this fever; not ſo much from a change on his outward appearance, but from a total alteration in his conduct, manners, and converſation.

Did you purchaſe the pannel's Majority? Yes, in the be-

beginning of 1783. What obſervations did you then make on his behaviour? We dined ſeveral times together during the negociation. At theſe meetings, I obſerved an uncommon change in Sir Archibald, a degree of flightineſs, a wildneſs in his appearance, and a kind of conduct perfectly different from what I had obſerved in him, previous to the date of the fever; as, prior to that, Sir Archibald's manners in ſociety were affable and conciliating. After my purchaſe from him, many opportunities of ſeeing did not occur; and, convinced of his derangement, I rather avoided than ſought them.

Do you recollect any particular opportunities of ſeeing the pannel after this period, and what did you obſerve in his conduct? About four or five years after the fever, I was on a viſit in the neighbourhood of Lincoln. Sir Archibald came to that town. He ſent a poſt-boy to me with a note, begging I would come over immediately on very particular buſineſs. When I came to him, he had no buſineſs whatever, nor would tell me what he was about, whence he had come, or where he was going. Do you recollect ſeeing him at Lincoln after this period, and any particulars which then occurred? Yes.

The year following, Sir Archibald came a ſecond time to Lincoln, when his conduct was much more extraordinary than on the former occaſion. A meſſage was ſent to me from one of the inferior inns, that a perſon begged to ſee me immediately. I returned for anſwer, that not being in the habit of going to people, whoſe name or buſineſs I was unacquainted with, the perſon muſt be more explicit, before I could determine about calling upon him. Several verbal meſſages paſſed to the ſame effect. At length a note came, urging me to to come immediately; that it was buſineſs of a moſt particular nature. I was exceſſively ſurpriſed at this note, and curioſity led me to go, and ſee who poſſibly could be the author. My ſurpriſe was ſtill further encreaſed, when, on entering the room, I beheld Sir Archibald. I queſtioned him, how he could be ſo ridiculous in not ſending me his name? He replied,

plied, that he had something very particular to communicate to me; and as he did not wish to be known, he would not send his name I begged to know what this business was. He went to the door, to observe whether it was fastened; and then began a long story, to me totally unintelligible, flying from one thing to another in the most incoherent manner, and talking of projects that he had, none of which he would explain. Sir Archibald dined at my house that day. Colonel Gardiner, a very gentlemanly and well bred person, was of the party, a perfect stranger to Sir Archibald. To this gentleman, without any apparent cause whatever, Sir Archibald, at first sight, conceived an absolute antipathy, and behaved to him very rudely and in the most boisterous manner and totally different from his former conduct; yet, on a sudden, his disposition changed so much, that he jumped from his chair, threw his arms about Colonel Gardiner's neck, kissed him, and seemed as much pleased with the Colonel's company, as before he had shewn aversion to it.—When he left Lincoln, he would not tell me where he had come from, or where he was going. The people of the inn thought him a most extraordinary being: they judged from his way of speaking to them, and odd manner of conducting himself.

When, and where did you last see the pannel; and what did you then remark? The last time I saw Sir Archibald was near the Adelphi. He formerly used to be very particular in his dress, that is, remarkably neat and clean; he then was quite otherwise, his hair uncombed, his shoes and stockings excessively dirty, (not apparently dirt collected from that morning's walk,) but as if they had not been cleaned for some days. We had some conversation, but his speech was so confused and incoherent, that I could not understand him. I was excessively glad, upon this occasion, to get rid of him; for it was distressing to see him so changed, so different from what he formerly had been. I may have seen him casually two or three times previous to the above meeting, and was confirmed in my opinion, in regard to his derangement; but, particularly,

ticularly the laſt time, I thought that the malady had encreaſed. Do you think that the fever in the Weſt Indies was the cauſe of this derangement? Certainly. Did it ever appear to you that the pannel entertained the ſame notion himſelf? I have obſerved him at times put his hand to his head, complain much, and ſay, that he felt pains there, the effects of the fever. He ſpoke of being troubled with the blue devils, and at thoſe times appeared very uneaſy in his mind. I once aſked him, when ſeeing him in that ſituation, Whether he repented of his having ſold out of the army? He replied, "No, no, "'tis not that; 'tis my head; I never ſhall recover that "St Lucia fever."

Had you ever any converſation with other officers in relation to the pannel's diſorder, and did they entertain the ſame idea of it with yourſelf?—In converſations I have had with officers, who have known Sir Archibald before his going to the Weſt Indies and ſince, particularly General Tottenham, Colonel Fitch, Lieutenant Fawcet, and others, they have agreed, that he never recovered that fever, and that he was deranged by the effects of it.

In my own mind I never had the ſmalleſt doubt, that Sir Archibald's intellects were deranged in conſequence of that fever, and that he had periodical attacks, that rendered him inſane, and conſequently not maſter of his own actions; as I am convinced, muſt have been the caſe at the period of the dreadful cataſtrophe, on account of which he ſtands charged. I formed this opinion from having known him previous to that fever, the change it cauſed in him, and the obſervations I made on his ſubſequent conduct.

MAJOR JOHN MACKAY, *examined by* Mr RAE.—Do you know the priſoner at the bar? I do. How long have you been acquainted with him? My acquaintance with my unfortunate friend, Major Gordon Kintoch, commenced in Ireland in the year 1767, when he joined the 65th regiment at Corke as an Enſign; to which regiment I then had the honour to belong. He was particularly

recommended to my care by the late General Mackay, who at that time was our Colonel. It was there, that the foundation was laid of that ſtrict friendſhip and intimacy, which have ever ſince uniformly ſubſiſted between us. He continued with us until autumn 1779, when he obtained the majority of the 90th regiment, and was ſoon thereafter ordered to embark for the Weſt Indies. Perhaps, this may be the proper time for me to mention the footing upon which Major Gordon lived with the 65th, during the twelve years he ſerved in it; and therefore, I take this public opportunity of ſaying, that he was friendly, generous and benevolent, univerſally beloved and eſteemed by every officer and ſoldier in the regiment, and when he left, it as univerſally regretted.

During the period which you have mentioned, did you ever obſerve the pannel liable to fits of bad humour, or jealouſy? No; I do not recollect, that during the whole of that period, I ever ſaw him ſeriouſly out of temper.

After that period, did you come to underſtand, or had you occaſion to remark, that a material change had taken place in the priſoner's diſpoſition, and that he was at times liable to derangement of mind? I learned afterwards, that the Major had been attacked with a very violent and dangerous fever in the Iſland of St. Lucia, which affected his brain much; and I have great reaſon to believe, that he has never entirely got the better of the effects of that malady; and I am the more confirmed in this belief, from the following facts, which I beg leave to ſtate to the Court.

After the 90th regiment returned to England, at the cloſe of the late war, I met ſeveral of the officers of that corps, who all agreed in opinion, that the Major had been occaſionally deranged in his mind, and that his health had never been thoroughly re-eſtabliſhed ſince he had that dangerous fever, to which I have alluded.

In the year 1783, I met him in London, where we were much together; and although I could perceive that he was not ſo connected and coherent in his diſcourſe as he

he formerly used to be, yet I was not sensible at that time that he had any deranged symptoms about him.

The first time that I had occasion to make any observation upon this afflicting subject, was at Mr Charles Dalrymple's house at North Berwick, in 1785. I accompanied the late Sir David Kinloch, Miss Kinloch, the late Sir Francis Kinloch, and the Major, to pay Mr and Mrs Dalrymple a visit. In the course of the evening, Major Gordon and myself sat down to play a rubber of whist at the same table; and I observed that he had been throughout the day in as good health and spirits as I had ever seen him in. After we left off cards, we walked out of the dining room together, when I was much surprised indeed to find that he had entertained an idea (as groundless as it was improbable, nay, I may add, impossible,) of my having affronted him, by endeavouring to place him in a ridiculous point of view, and to make him the butt of the company; he said that I was the last man from whom he expected such unfriendly usage; and that he never would forget it.

The effects, which I had been told, his West India fever sometimes produced in his mind, struck me so very forcibly, that I was instantly convinced, he was then in a certain degree deranged: and although I used every friendly argument in my power to remove his suspicions, which were as groundless as they were unkind and unjust, yet these had no effect.

Next day, I was obliged to come to Edinburgh, and in consequence I wrote a letter to Mr Duncan M'Millan, (who was very intimate at Gilmerton,) desiring him to shew it both to Major Gordon, and to the late Sir Francis Kinloch, in which I explained the whole matter; and Mr M'Millan wrote me that he had done so. Sometime afterwards, I met Sir Francis; who, upon the subject being mentioned to him, said, that he was perfectly sensible that I had not given his brother the smallest cause of offence at North Berwick; that he was convinced his temper and disposition were totally changed; that he had often observed him to behave in a most inconsistent manner;

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and that he attributed all this to his West India fever; for he was not the same man since his return to Europe, that he had been before he went out to the West Indies.

In Summer 1790, I happened to be one day in the coffee room at Greenock, and was much surprised to see Major Gordon enter. I immediately perceived a wildness in his looks, which I had never seen before. He told me, that he had posted all night from Berwick without sleeping, to find me out, in order to communicate to me matters of the utmost consequence to himself, as he looked upon me to be his most confidential friend. I asked him what he meant? upon which he took a letter out of his pocket, and gave it to me, saying, "Read that, "and then be convinced how ill I have been treated by "my whole family." This was a letter from his brother Mr Alexander, acquainting him with the death of their brother Captain David, very expressive of the distress the family were in upon that melancholy occasion, and full of affection towards the Major himself, earnestly entreating him, at the desire of Sir David and the rest of his family, to return to Gilmerton. Upon my observing, that this letter was very foreign to the subject he had mentioned, he replied, "That letter is a sufficient "proof of the truth I have told you, and I have no "other proof." At this time, the Major appeared to me to be quite deranged in his mind. I told him, that he seemed to be much indisposed, and pressed him to go to bed to try to get some sleep, after his fatiguing journey, and also to remain with me at my sister's house, who lived in the neighbourhood of Port-Glasgow; but all this he positively refused to do, and said, that he was obliged to return immediately to Berwick, where he proposed sleeping that night, and instantly set out, notwithstanding I used every argument in my power to dissuade him from his purpose.

The next time the Major appeared to me to be in a deranged state of mind, was in Dumbreck's hotel in Edinburgh, four or five days before the death of the late Sir Francis Kinloch.

Kinloch. One of the waiters having told me he was in the houſe, I immediately went to him, between ſeven and eight o'clock in the evening: He was then going to dinner, and appeared to me to be totally depreſſed in his mind, and quite incoherent in what he ſaid. I was obliged to aſk him the ſame queſtion two or three times before he would make me any anſwer, and then he uſed to ſtart up as if ſomething had alarmed him. He told me that he had been extremely ill indeed, ever ſince the death of his father, who had made what he (the Major) conſidered a handſome proviſion for him, and with which he was perfectly ſatisfied: At this time he ſpoke of his brother Sir Francis with great affection. The Major told me, that he was obliged to ſet out early next morning for London upon particular buſineſs. I remonſtrated with him againſt undertaking ſuch a long journey in his preſent ſtate of health, and adviſed him to ſend for, and conſult ſome medical gentlemen: I likewiſe told him, that I intended ſetting out myſelf in a few days for Buxton, and preſſed him much to wait for me, and that we could travel ſo far together; but he would not liſten to any thing I propoſed, and ſet out next morning in a poſt-chaiſe, with an intention, as he told me, to dine at Gilmerton on his way to London.

Did you think that the Major's ſituation on this occaſion proceeded from intoxication? By no means. He called for a bottle of wine, and drank only a few glaſſes of it. Indeed his ſituation made ſuch an impreſſion on my mind, and I was ſo much convinced of his deranged ſtate, that when I went home, I told my ſiſter, (who was well acquainted with the Major,) that I ſhould not be ſurpriſed if he committed ſome raſh action againſt himſelf.

When did you again ſee the Major? I went to the Major the day after he was brought into Edinr. Jail, at his own requeſt, and found him as calm, rational, and collected, as I ever remembered him, and perfectly ſenſible of the deplorable ſituation which he was then in. He ſaid, he had been much deranged in his judgement for a conſiderable time before the fatal accident befel his brother, and that he

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did not know he had a piſtol in his hand, till he heard the report. I called upon him two days afterwards, in company with Dr James Home, and found him, (as I thought,) quite delirious and furious; and, when we left him, I had ſome converſation about him with Dr Home, who was of opinion, that if the Major's fever continued much longer, it would be adviſeable to put the ſtrait-waiſtcoat upon him. When I went in upon this occaſion, the Major was walking rapidly about the room, which was very ſmall, as if for a wager.

Lord Advocate. You have told us, that, when you ſaw the pannel at Dumbreck's hotel, he was alarmed, and that you had to aſk the ſame queſtion two or three times over before he gave an anſwer. Now, when he did return an anſwer, was it a rational and diſtinct one? It was generally pretty much ſo, but expreſſed with a degree of melancholy and wildneſs which I never obſerved before.

Captain MILLER *examined by* Mr MONYPENNY.—Are you acquainted with the pannel? Yes. How long have you known him? About twenty-three years. I joined the 65th regiment as an Enſign in the year 1771; and Sir Archibald, then a Lieutenant in the ſame regiment, joined us at Halifax, Nova Scotia, a year or two after; and he afterwards purchaſed a company in the regiment. In what eſtimation was the pannel held in that regiment? During the whole time I knew him in it, he was univerſally beloved and reſpected by all the regiment, both officers and men. When did the pannel leave the regiment? In the year 1779, when he was promoted to the Majority of the 90th regiment, along with which he went to the Weſt Indies.

When you next ſaw the pannel, did you obſerve any change upon him? When I ſaw him after his return to Britain, he informed, me that he had been attacked by a violent fever at St. Lucia, which had greatly impaired his health. Did you ſee him ſoon after he returned? I did not ſee him till 1789. We met by chance in the Strand. I was ſurpriſed to find him ſo much altered. Formerly he was a moſt converſable gentleman, the mildeſt and moſt humane

humane character; but now I obſerved a moſt remarkable change. Was the alteration in his manners, or in his bodily appearance? Both. He was very ſlovenly in his dreſs, and his hair, which was formerly a fine brown, was now turned white. He often told me, that he had always been diſturbed in his mind ſince he had the fever in the Weſt Indies.

Do you think the alteration in his temper might be the effects of intoxication? No. We dined frequently together in coffee-houſes in London, when we never drank above a bottle of wine between us, and I never ſaw him but ſober; though his converſation was often wild, by what I had been uſed to.

Had you occaſion to ſee the pannel in 1790? Yes. In October that year, I received a letter from him, dated from a hotel in Oxford road, preſſing me to come to him immediately, as he was in a very bad ſtate of health, and had no relation or acquaintance in the world that he cared for but myſelf. I was then at Huntingdon recruiting, but immediately went to London. On calling at the hotel whence the letter was dated, I could get no account of him, except that a ſtrange ſort of a gentleman had ſtaid there for a few days, and had gone away without ſaying whither. I however, found him at laſt very ill, in bed, at old Slaughter's coffee-houſe in St. Martin's Lane, kept by one Reid. I ſtaid with him a few days in the ſame houſe till he got better, and then returned to Huntingdon.

When did you next ſee the pannel? In November following, he came down to Huntingdon to ſee me, and ſtaid two or three days, and then ſet off for Scotland. Did you remark any thing particular in his converſation at this time? He frequently repeated to me his diſtreſſed ſituation of mind: and he told me ſome odd ſtories of himſelf, ſuch as that he had gone about England in ſtage-coaches and ſtopped for days, where ſtrolling players were acting in a barn, when he engaged himſelf as fiddler to them, and many other acts of that ſort, which clearly proved to me his derangement of mind. At this time he was dreſſed

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in black (I believe one of his brothers had died recently before); and he told me, that he would never alter the dress, as he was determined never to mix with the world again; and he actually sent many of his coloured clothes to my lodgings, to be disposed of as I might think proper.

Lord Advocate. When you conversed with him, were the answers he returned to your questions rational and coherent? Sometimes he returned correct answers, at other times they were quite incoherent.

Miss KINLOCH.

This lady was in the Outer Parliament House. Mr Hope waited upon her by permission of the Court, to inform her, that she was the next witness he meant to adduce. He remained only a few minutes, and when he returned, addressed the Court in the following terms.

My Lord,

I am now under the necessity of calling upon your Lordships to review your former judgement. I have been with Miss Kinloch, and I found her in a condition which I cannot describe. In such distress, that, by heavens! were it my own life that was depending, I would not ask her evidence. She has declared to me, that unless she is permitted to look at her notes, she cannot promise to answer a single question. Will the Court, under these circumstances, adhere to the judgement already given?

Lord Advocate. In the conduct of this trial, as in all others which it has been my lot to manage, I have been guided by the principle of public duty. However much I may be affected by the distressed and melancholy situation of the family, I cannot discriminate between the case of this lady, and that of the poorest woman in the kingdom. I must not yield to my feelings: And I will not, on any consideration, deviate from the line of equal and impartial Justice.

That he or she, who, upon a question being put, does not recollect,

recollect, may look at notes taken at the time, and then make answer, is what I shall not oppose; but, my Lord, if any thing more is meant, I do say that it is contrary to the practice of this Court, and would be establishing a most dangerous precedent. If, therefore, this lady cannot give her evidence in this manner, I must, however painful the duty may be, object to any deposition which is made by reading from notes of another kind.

Mr Hope. My Lord, since I began to make the nature of law my study, I have always thought, that if there is one maxim which ought to be held more sacred than others, it is, that mere form shall never stand in the way of truth and justice. Now, my Lord, how are these to be obtained, if witnesses are to be precluded from giving their evidence, in the only manner in which they possibly can give it?

We have brought forward many facts with regard to that species of insanity with which the pannel is afflicted. We have traced him in his wanderings about the country, but do your Lordships imagine, that these were the only occasions on which his disorder appeared? Would his own family proclaim to the world his melancholy situation? Is it not to be supposed, they would rather be careful to conceal it? My Lord, in the case of *occult crimes*, the members of a family are always admitted to give evidence, because the truth cannot be obtained in any other way: Now, although the insanity of the prisoner has accidently been observed by others, yet no one can doubt, that it must have been much more frequently observed by his own family. It is therefore an *occult fact*, wich although it has been *partially* proved otherwise, can certainly be completely established only by the evidence of members of the family. The counsel at the table, are not the only counsel for the prisoner, your Lordships are bound as much as we are to see that his cause is not injured;—and is it reason or justice to refuse to allow this lady to look at her notes, when she has declared, that she cannot give her evidence in any other manner.

My Lord, it is not for Miſs Kinloch, it is for her ſex I aſk it. Muſt not any woman of delicacy be confuſed and agitated at appearing before this public Court? How much more ſo on ſuch a melancholy occaſion, for which this Lady comes. When ſhe is in ſuch a ſituation of diſtreſs,—a ſituation, which were ſhe not in, I am ſure both your Lordſhips and the Gentlemen of the Jury would think it a much ſtronger objection to her teſtimony, than giving her evidence from notes. Will you, or can you deny her the aſſiſtance neceſſary for counteracting the confuſion and agitation, which it would be a crime in her not to feel?

But it is not to your feelings, it is to your juſtice I appeal, For what is the objection but a mere matter of form? Your Lordſhips have ſaid, that when ſhe is on the other ſide of that wall, at the very moment before ſhe enter's this Court, ſhe may peruſe her notes; but when ſhe comes to the foot of this table, that is, at the very moment, when ſhe ſtands moſt in need of her notes, ſhe is not to look at them. Shall it be ſaid in this free country, in this enlightened age, that truth ſhall be withheld upon ſuch frivolous pretences? Upon ſuch a mere fiction, nay what I had almoſt called a quibble of the law? My Lord, were I the conductor of this proſecution, I declare, I would rather abandon it altogether, than ſupport it by ſuch means.

The Court determined, that Miſs Kinloch might look at her notes, and then give her evidence upon oath.

Lord Juſtice Clerk. I was always of opinion, that witneſſes had a right to look at their notes for the purpoſe of aſſiſting their recollection; but at the ſame time, I think Mr Hope was rather too warm, when he ſaid, that your Lordſhips were putting form in the way of juſtice. It was not on account of form that the Court decided againſt a witneſs reading his notes, but from a deſire of keeping pure the channels of juſtice, by ſuffering no practice to be eſtabliſhed, which might tend to corrupt them.

Miſs Kinloch was now brought into Court, attended

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by two ladies in mourning, and was seated at the foot of the table below the bench. She was examined by *Mr Hume*, who repated her answers aloud to the Court and *Jury*; the Lord Advocate of his own accord having offered to take them in this way, upon seeing that the witness was agitated, and unable to raise her voice. She deponed, That she had frequently heard her father Sir David say, that the Major had never been sound since he came from the West Indies. That one day, about six or seven years ago, she heard Sir David enquire for the Major, and being informed that he was gone for London, without giving any previous notice, he said, "That poor mad "creature Gordon, is much raised at present; and I am, "afraid that one day he will be in a state of confine-"ment." That on several occasions, when Gordon was doing strange and unaccountable things, Sir David has said, "Poor Gordon's head is very much turned," and other expressions to that effect. And in particular, she remembers that on one occasion, when the family was at Wooler, and Gordon was hastily taking leave of them, Sir David said, "Poor Gordon, his malady is coming on." That Sir David once told the witness, that Gordon had taken it into his head that he had signed a renunciation of his inheritance, and this he mentioned as a proof that his head was turned. That the witness was from her own observation convinced, that these remarks of her father's were just, and his opinion too well founded. That in the end of March and begining of April last, the witness observed his malady plainly coming on, and gradually gaining ground, and becoming more violent than she had ever seen it before. That the appearances about him were so alarming, that she apprehended danger to her own life, and was afraid to be alone with, or near him. On the Saturday, Sunday, Monday and Tuesday, preceding the fatal accident, she never saw the symptoms of his malady so violent; in so much, that she advised Sir Francis to send for medical assistance, and to have him secured least he might do harm to himself or others; and she thought this

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advice so necessary, that she always kept out of his way, and had for weeks before locked the door of her bed-room for fear of his coming in upon her. That nothing occurred afterwards, to make her think that this advice was groundless or unnecessary, but on the contrary, every thing confirmed her in her opinion. That on the Monday the Major told the witness that he had taken poison, and took out his watch, and requested her to take it from him as a keepsake, for he had not many hours to live; and at this time he was in a state of extreme agitation. Upon the Tuesday, when she went up to her chamber, she desired the servants to hold Gordon's room-door fast, while she passed it, and slipped by, as she was afraid he might follow her, and perhaps make away with himself before her face. When he said he had taken poison, she did not at the time believe him, but she afterwards found, that he had swallowed a whole phial of laudanum, which he had taken from a cabinet in her room. That she would not, on any account, have retired to her room on the Tuesday night, if she had in the least suspected that Sir Francis himself meant to seize him, for she knew the danger of it; and that Sir Francis had told her, that the Major was more quiet than he had been, and that they would not seize him that night.

Being interrogated by the Lord Advocate, the witness deponed, That the family never proposed to take any steps against him as an insane person prior to the Sunday. On Tuesday Sir Francis told her, that Gordon had been out all night wandering in Beanston wood, and was raving mad.

Again interrogated by Mr *Hume*, she deponed, That on the Tuesday evening, the Major more than once attempted to break into her room, which was locked against him; and on these occasions, he complained that the witness refused to see him, when Sir Francis saw him, and was so kind to him.

Mr Hume. Though I have reason to believe, that a more detailed and particular examination of Miss Kinloch would bring out many strong circumstances in the pannel's favour,

favour, and though it was at first my intention to have proceeded in that manner, yet, in her distressing situation, and as I hope the case will not require it, I shall forbear to press it farther, and content myself with the few general questions which have been put.

JOHN WALKER, *Tenant in Beanston, examined by* Mr HUME. Did you see the pannel on Tuesday the 14th of April? Yes. You will endeavour to recollect what passed? About a ½ after five in the morning, as I went out to yoke, I saw a gentleman walking near my house, which is about a mile from Gilmerton. He was dressed in black, and cried *halt*. This gentleman turned out to be the Major. Was there any body with him? No. What further passed? I shook hands with him. He seemed much fatigued. His clothes were disordered, and his appearance confused, and I invited him into the house,—took him up stairs to a room, and recommended a bowl of tea and a bed. His stockings were very wet, and stuck to his feet and legs.—I at first conjectured, that he had been up all night at Mr M'Leod's, but when I hinted this, he said in a surly manner, *John, Don't ask me where I have been.* I rubbed his feet and legs until they came to some heat, and then he lay down upon the bed. He said in an angry tone, before I left him, that he would not be wakened.

About five o'clock in the evening, however, being a good deal alarmed, I went up stairs to see if he was awake, and knocked at the door, which I found was barricaded within, *now* says I to the Major, *it is five o'clock; It is time that you were up.* He rose, and removed some chairs, with which he had barricaded the door, and then he opened the door a little, and looked out with a wild appearance, having two pistols in his hand. He asked me, after I went into him, If my wife had any laudanum? I said, perhaps she might have a little; but he answered, that he would take 350 drops, and that nothing less would do, for that he wanted an everlasting sleep, never to waken. Then he walked up and down the room

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in great agitation, ſometimes pointing a piſtol to his left ſide, and preſſing the muzzle under his ribs towards the heart, and at other times pointing it to his ear or his forehead. I attempted to expoſtulate with him, but he ſaid, (and here the witneſs uſed a loud and poſitive tone,) "*Don't interfere, John.*" He then ſat down, and deſired me to draw a chair near him, after which he beat upon his breaſt, and exclaimed, *Ah! John.* He next preſented a piſtol to himſelf, repeating again, "*Don't interfere* "*John.*" I aſked, if any of the family had offended him? He made no anſwer to this queſtion, but ſaid, "*Above all things, I would wiſh to ſee William Reid and* "*Sandy Kinloch.*" He alſo ſaid, he would take ſome tea.

I went down ſtairs to order my wife to get the tea ready, and to ſend for William Reid, and I then ſaid to her, "If a piſtol goes off, be not ſurpriſed, for the Major "is deranged in his judgement, and I am afraid, he will "make away with himſelf."

I took up the tea.—I poured ſome into a ſaucer, and held it to his lips, for he was not in a condition to carry it to his head himſelf. It was hot, and he ſaid, "John "you have burnt me." He drank three ſaucers full of tea, but did not eat above an inch of bread. All the while I was helping him to the tea, and holding the ſaucer to his head, he held a piſtol, (which I ſaw, and heard him cock,) to my ſide, within three inches of my belly, keeping his thumb upon the cock, and his finger at the trigger; I was much alarmed, but when I went down ſtairs, I did not let my wife and daughters know the danger I was in.

When did William Reid come, and what paſſed? He came ſoon after. I informed him of the ſituation in which the Major was, and deſired him *to tell Sir Francis to ſend all the men in Gilmerton to ſeize him, for he would do miſchief either to himſelf or ſomebody elſe.* William Reid went and knocked at the room door. The Major opened, and ſet it a jar a little, and looked out preſenting a piſtol before him. William retired ſome ſteps down the ſtair at

firſt;

firſt; but afterwards, on the Major preſſing him, and aſſuring him that he would not do him any harm, he went into the room; but in a ſhort while came down ſtairs, and went away. The Major came down ſtairs ſoon after, and ſaid, "John you muſt give me a convoy." I went out with him, but we had not gone far when paſſing by the ſtack-yard, he ſaid, "John, there was my bed among the ſtacks laſt night." I anſwered "while there was a bed in my "houſe, I am ſure you had no occaſion to lie there." He deſired me to walk before him; but hearing him cock a piſtol at my back, I was alarmed, and turned about. He ſaid "Are you afraid John," I replied, "No, I am ſure, I "have no reaſon to be afraid of Major Gordon." Soon after I heard him let the piſtol down to the half-cock, and in a little while I heard him cock it again, and in this manner we walked on together; the Major keeping behind me with the piſtol. I now began to look about for an opportunity to eſcape, but finding I could not ſafely get away, I went on, until we came to a walk, which I knew the Major was fond of. I there took leave of him, under ſome pretence, and returned home, very happy to have eſcaped as I did.

WILLIAM REID, *gardener at Gilmerton, examined by* Mr HUME.—

How long have you been gardener at Gilmerton? For 23 years. Had you occaſion to ſee Major Gordon on Monday the 13th of April laſt? I ſaw him about one o'clock in the afternoon. What paſſed then? The Major was walking from the houſe towards the garden, when I heard him call to me by name pretty ſharply; on which I turned back and went up to him, and took off my hat, which he deſired me to put on again. The Major then, with a good deal of agitation, felt firſt his waiſtcoat pockets, then his breeches pockets, and then his waiſtcoat pockets again; and ſeemingly much diſappointed at not finding what he wanted, ſaid, with a melancholy tone, "I thought I had had ſomething;" upon which I (thinking

ing that he intended to give me something,) begged to be excuſed, and ſaid, that the Major had often been kind to me and my family. The Major then took ſeveral ſtrides backwards and forwards, ſeemingly in great agitation; whereupon I ſaid, that I was ſorry to ſee him not well; but he made no anſwer, and ſtill continued to ſtride backwards and forwards, and I left him. Did you ſee the Major on the afternoon of Tueſday the 14th of April? Yes. About five or half-paſt five, a ſervant maid of Mr Walker's came down with a meſſage from her maſter, deſiring me to come up to Beanſton immediately, for Major Gordon was there in a very deranged ſtate. Did you go, and what paſſed? I met Mr Walker at the door.—He took me aſide, and told me, that the Major had come there between five and ſix in the morning, and that he had arms with him. Then Mrs Walker came out, and deſired us to go up ſtairs immediately. Mr Walker rapped at the door, and told that I was there; on which, the Major juſt opened the door a few inches, looking out with a ſuſpicious countenance, and a piſtol in his left hand, and again ſhut the door. He had a very raiſed, wild look, and his eyes had a very particular appearance. His hair was hanging looſe, and his ſtockings off. I ſaw the piſtol, and told Mr Walker, that I would not go into the gentleman in that condition. Did you afterwards go into the room where the Major was, and what paſſed there? After I got down a ſtep or two of the ſtair, the Major again opened a little bit of the door, and ſaid, "Is that you, William?" I ſaid it was. He then opened the door, and preſſed me to come in. I refuſed, unleſs he would lay aſide the piſtol; on which he ſaid, "Upon my "my honour, William, I'll do you no harm."—I again begged him to lay aſide the piſtol, which he agreed to do; and I heard a ſound, as if he was taking it from cock to half cock. When I went in, the Major immediately clapped to the door, and put a chair upon the handle of it, ſo as to have ſome purchaſe. I ſtill obſerved the piſtol in his hand, and was very uneaſy about it; when

when the Major told me not to be afraid, and repeated that he would do me no harm. I ſaid, it was his weapons that I feared and not himſelf; and that, if he would lay them aſide, I would do any thing for him, or go any where with him. Upon which he aſked me If I was ſure I did not mean him any harm? And although I aſſured him that I did not, yet he was not ſatisfied, till he had cauſed me ſwear by the God of Heaven, that I would do him no hurt. He then threw two piſtols, with conſiderable violence, into the bed. We then ſat down; but the Major immediately roſe, and came forward, and laid hold of me with both hands by the breaſt, and ſtared broadly in my face. He ſaid, "Where do you think I have been "all night William?" I anſwered, "I don't know, Sir." He ſaid, "in Beanſton planting; I had a light from heaven "which appeared upon a buſh, and I heard it crackle." I ſaid, "like the crackling of thorns, Sir." He anſwered, "Yes, but it was not conſumed. The Major then ſat down again, and took out a piece of paper, and ſaid, "Wil-"liam, you have a family. This will be of ſome uſe to "them." I at firſt refuſed it, but, on the Major's inſiſting, took it, and ſaid I would keep it till I ſaw him again; on which the Major ſaid, "you will never ſee me again, "William:" and after ſome incoherent converſation, he ſaid, "the prophecies of heaven muſt be fulfilled." I obſerved that heaven had never prophecied, or ordered, that a man ſhould make away with himſelf. In the courſe of this part of the converſation, the Major took a ſmall phial out of his waiſtcoat pocket, and ſaid, "I have taken all "this, and yet am ſtill here." I got the bottle into my hand, and obſerved, that it ſtill contained a drop or two of a deep coloured liquid; but the label was all torn off, except the border which was red. I aſked to keep the bottle, but this the Major poſitively refuſed. What further paſſed? He aſked me to bleed him, but I anſwered, that I had not my lancets; and was very much alarmed in caſe he ſhould deteſt me. He then turned ſick, and went towards the bed, and reached once or twice into the cham-

ber pot. I was afraid of his going towards the bed where the piſtols were, and followed him, and, laying hold of the piſtols, put them into my pocket; upon which the Major darted his hands into my pocket, and took back the piſtols, ſaying, he could bear any thing but that. I then aſked permiſſion to unload the piſtols, which he refuſed. The Major then ſat down on the foot of the bed, when I deſired him to remember, that the firſt and leading inſtinct of nature was ſelf preſervation; and not to take away what he could not put there, or otherwiſe, he was taking away the prerogative of the Almighty; he, ſaid, he knew that. I afterwards ſuggeſted, that he had better go down to Gilmerton, and not give Mr Walker's people trouble; upon which he ſtarted up, and ſaid, "What, "William, do you think I'm a trouble." I checked myſelf and ſaid, "I did not mean that Sir, but only that you "would be better off at Gilmerton, where you would get a "good room to yourſelf, and a ſervant to attend you." The Major ſaid, "I believe you're right William," and agreed to go; but in a moment, throwing himſelf back in his chair, ſaid, "I cannot go." I ſaid, if he was not well, I would go down and get the coachman, and help him down. But the Major ſtill repeated, that he could not go. He then aſked me Who were at Gilmerton, and I acquainted him, mentioning, among others, a Mr Low from the Merſe. Upon this I offered to go away; but the Major ſaid to me, in the moſt earneſt manner, "You muſt not "leave me to-night William." I however pleaded a great deal of buſineſs, which led to ſome converſation about what was going on in the garden. About this time, the Major ſuddenly aſked, if Mr Low was down ſtairs, and inſiſted that I had told him ſo, to which I anſwered, I meant Mr Low was down at Gilmerton. With ſome difficulty I at length obtained leave to go away, upon promiſe of returning; and, after getting out of the room, made the beſt of my way down ſtairs. On coming down, I met Mr Walker, who took me into a private room, and I ſaid that I was under the neceſſity of going home; and Mrs

Walker

Walker coming in, said, it was very right not to detain me, and that Mr Somner should be sent for. I then got out of the house; but upon passing by the window of the room where the Major was, I heard a violent rapping on the window and, looking behind, observed the Major; on which I ran home as fast as I could, and, after telling my wife a little of what passed, but not to be uneasy, I went forward to the house of Gilmerton. Did you inform any person there as to the Major's situation? Yes. I called out Mr M'Millan to the lobby; but before I had time to speak to him, Sir Francis himself came out; and I told them what had passed, and added, that I would on no account see the Major, as I was afraid I had offended him by not going back when he rapped for me. Did any conversation pass respecting the bit of paper which you had received from the Major at Beanston? On the road from Beanston I looked at it, and found it to be an English bill or bank note for L.30. I accordingly shewed it to Sir Francis and Mr M'Millan in the lobby, and gave it to Sir Francis, who returned it to me; and I next day gave it to Mr Hay Smith messenger, to be delivered to Mr Fraser.

Did you again see the Major in the course of the Tuesday evening? Yes, while I was in the lobby with Sir Francis and Mr M'Millan, I observed the Major pretty nigh coming under the trees towards the house; upon which, after repeating that I would by no means meet with him, I went through the lobby towards the servants hall, where I found the brewer, and told him, for God's sake, to go to the lobby and make himself useful, if he was wanted. Did you afterwards see the Major that evening? Yes, sometime after, Sir Francis came and told me that the Major was in his room, and requested, as he seemed to have a good opinion of me, that I might go up and endeavour to get the pistols from him, and persuade him to go to bed. Though I was under considerable apprehension, I consented to go at Sir Francis's request; and accordingly went

into

into the room, refolving at once to put myſelf upon the Major's mercy. The Major, however, received me kindly, and ſhook me by the hand, ſaying he was glad to ſee me. *Mr Hume.*—Mention all that paſſed.

In a little, the Major went to the head of the ſtair, and to the door of the room where the young Cunliſſes were, under the care of my daughter, who had bolted the door. The Major ſaid he muſt be in to ſee the children, of whom I knew him to be very fond, on which I called to my daughter, that ſhe need not be afraid, but might open the door, which ſhe accordingly did, and the Major went up to the bed, and clapped Maſter Cunliffe on the cheek; but, on my begging him not to wake the child, he came away, and ſaid he would go to his bed. He accordingly returned to his room, and I went down ſtairs, and into the butler's parlour at the foot of the ſtone ſtair. Did you then leave the houſe? No. Being ſuſpicious of what might happen, I watched every foot I could hear in the ſtair, and ſoon heard the Major come down; on which I followed him into the lobby, and Sir Francis, who was there with ſome of the gentlemen, pointed to me not to let him out. I accordingly ran up, and got the Major under one arm, while Sir Francis took him by the other. The Major, however, got a little way on the gravel before the door, when he juſt turned about, and looked up ſtaring wildly at the front of the houſe. The Major then returned to the houſe, and, when the gentlemen quitted him, paſſed through the lobby, and tried to open the back door; but, on finding it locked, he went up the wooden ſtair. I followed him, and ſaw him try to open ſeveral doors; but, on finding them locked, Aſked what was the meaning of all that? and the butler made ſome excuſe, that they had been waſhing the rooms. The Major then returned to his room, and ſome time after ſaid, he would go to bed; on which I wiſhed him good night, and he ſaid, "Good night William, and a heaven-"ly morning." Did you immediately go down ſtairs? I ſtaid in a ſmall room at the head of the ſtair, and ſoon heard

heard the Major leave his room, and ſtepped forward to meet him, and prevent him from going down; on which the Major ſeemed diſpleaſed, and ſaid, "What is the "meaning, William, of all this intereſt you are taking "about me to night?" I anſwered, "I thought you had "been in bed Sir, and am afraid you will catch cold go-"ing about in that manner," He had many of his cloaths off. He then told me to go home to my family, and not mind him; and after this he went back to his room, and I went down to the butler's parlour. Were you not ſoon afterwards ſent for by the Major? Yes, on my going up he deſired me to ſhut the door, which I only puſhed to, without ſnecking it. The Major next deſired me to lift in a table that was ſtanding at the end of the room fartheſt from the door, which I was affraid to do, as he would thus be between me and the door; but, upon his again deſiring me to lift in the table, I did ſo.—The Major immediately laid down upon the table a book which he had in his hand, and which I believed to be the bible; and he repeated ſome lines of poetry, which I do not recollect. After ſome converſation, the Major obſerved, that the door was not ſhut; upon which he ſeemed to be angry, ſaying, "How could you deceive me, "William, by making me believe that the door was ſhut "when it was not?" I excuſed myſelf by ſaying, I thought it had been ſhut; upon which the Major repeated the order, and I was obliged to ſhut it. When the Major ſaw the door was ſhut, he went towards the eaſt window, and one of the ſhutters being ſhut, he flung it open, and then put ſeveral queſtions to me. Among others, he aſked me, How many children I had? and I having anſwered that I had five, the Major replied, "And your wife "makes ſix." The Major then drew his chair cloſe to me, and looking me broad in the face, ſaid, "William, "have you told the people here what paſſed at Beanſton." I being afraid, anſwered that I had not. The Major ſaid, "I did not expect ſuch a thing of you, William;" on which, I again aſſured him, that I had not. Some-

time

time after, he wiſhed me good night, and I ſaw him no more.

Did you ſuppoſe the Major to be the worſe of liquor on the Tueſday evening? No. When I firſt ſaw Sir Francis and Mr M'Millan in the lobby that evening, I told them, that I neither perceived nor ſuſpected the Major being the worſe of liquor.

Dr. JAME HOME, *Phyſician in Edinburgh, examined by* Mr MONNYPENNY.

Did Major Gordon appear to be much affected by his father's death? Major Gordon appeared much affected by his father's death. He had paid him the greateſt attention during his laſt illneſs. Do you recollect ſeeing the Major in Edinburgh, about the beginning of March laſt; and what ſtate did he appear to be in? On the laſt day of March, or firſt day of April, I met Dr Farquharſon in the Exchange; amongſt other converſation, he aſked me If I had ſeen my friend Gordon? I aſked him what Gordon? He ſaid Major Gordon Kinloch. I told him that I had not ſeen him. He then ſaid, he had met with him today; and that, from his appearance and converſation, he thought him in a very *queer* ſtate, and that he would not be at all ſurpriſed, if the Major deſtroyed himſelf. I told Dr. Farquharſon, that his appearance, at times, had long impreſſed me with ſuch an idea. Next day, (the firſt or ſecond of April,) hearing that Major Gordon lodged at Robertſon's, Black-Bull, head of Leith-Walk, I called upon him about four o'clock. He ſtarted when I firſt came into the room. I ſaw that he was in very low ſpirits.—I aſked him to dine at Hunter's, Writers-Court, along with his brother Mr Alexander Kinloch. He readily agreed. When in the ſtreet, he appeared to me to be very nervous or irritable; the paſſing of a carriage along the ſtreet, ſeemed to agitate him. At dinner, he tried to eat ſeveral things, but found that he could not. The waiter endeavoured to ſolicite his appetite, by preſenting him with every thing that was nice in the houſe; but it was in vain

vain, he did not eat an ounce of any thing. In particular, I recollect, the waiter propoſed to devil ſomething for him, when the Major replied, "All the devils in "hell wont appeaſe my ſtomach." He could not drink port, and ſeemed to diſlike every kind of drink; at laſt, I prevailed upon him to get a little brandy, which he drank, mixed with a large quantity of water. We parted at half-paſt ſeven o'clock, and, in that time, he drank one gill of brandy, or two at the utmoſt. His appearance that day ſtruck me very much, and I reſolved upon taking the firſt opportunity of informing Sir Francis of his ſituation.

Did you accordingly ſpeak to Sir Francis on the ſubject? I ſaw Sir Francis Kinloch in the evening of the next day, after having ſeen Major Gordon. I told him my opinion of his brother, which was, that I thought him in ſuch a ſtate of mind, that he would probably attempt to deſtroy himſelf, and adviſed him to look after him. Sir Francis ſaid, that of late years his brother had become ſo peculiar in his temper, that he did not chuſe to meddle with him; that he had frequently obſerved ſuch melancholy fits; that generally after theſe, he became very reſtleſs; and that he would then diſappear from Gilmerton for a long time; that nobody knew where he went to; and that he returned perfectly well. About this time, when I was adviſing Sir Francis Kinloch to leave the town and go to Gilmerton, as the beſt way of getting free of a cold which he then had, he told me, as a reaſon for his not going to his own houſe, that his brother the Major was then in a very unſettled ſtate, and that he wiſhed him to go away from Gilmerton, which he always did when in that reſtleſs diſpoſition, and that then he (Sir Francis Kinloch) would leave the town. Did Sir Francis, before this period, ever mention to you his brother's occaſional derangement, and aſſign any cauſe for it? Sir Francis has frequently mentioned to me his brother's diſordered ſtate of mind as a matter of great concern to himſelf, and to the whole family. He attributed it to a fever which he had

when

when in the Weſt-Indies; as previous to his going to the Weſt-Indies, he was a very good tempered man. Did you again ſee the Major in Edinburgh in April laſt; and in what ſtate did you find him? On the 9th of April, I ſaw Major Gordon in his brother Mr Alexander Kinloch's room, at Dumbreck's, about three o'clock, Mr Waite, and Mr James Home Writer to the ſignet, were in the room along with him. He appeared to be very melancholy and ſpoke little. Mr Waite went away ſoon after I came in. In a little time Major Gordon went away. I took that opportunity of going with him. I aſked him to take a walk before dinner. My reaſon for this was, that I wiſhed to have ſome converſation with him upon his health; but he declined taking a walk, as he ſaid he had a headach, and was buſy preparing for his journey to London, as he intended to ſet out next day. We parted at the door of Dumbreck's other hotel. He did not even aſk me to come in with him to his lodgings. Were you called to Gilmerton, after the accident which befel Sir Francis? In what ſituation did you find him? and had you any converſation with him, particularly reſpecting the accident? On the 16th of April, in conſequence of a letter from Mr M'Millan at Gilmerton, mentioning, that it was Sir Francis's wiſh that we ſhould come out and ſee him, Dr F. Home and I went out to Gilmerton, and got there by half paſt nine o'clock in the morning. We found him in ſuch a ſituation that he could not live many hours. He gradually ſunk, and died about half-paſt eleven o'clock that evening. He remained perfectly ſenſible until within an hour of his death. I ſeldom left him for above ten minutes at a time. He talked very little, and only once about the accident which had happened to him. It was about two or three o'clock, *Sir Francis* aſked me, "What have they done "with my poor (or unhappy) brother." I anſwered, "He "was carried to Haddington Jail laſt night." Sir Francis replied, "It would have been much better "to have ſent him to a private madhouſe about Edin- "burgh." "But you know, (ſaid I,) "that this unhappy

"accident

" accident must now become a matter of legal inveſtiga-
" tion, and he is committed to Haddington Jail by orders
" of the Sheriff." Sir Francis then obſerved, " They had
" much better let it drop, for he was mad."——As Sir Francis had begun the ſubject, I thought it a proper opportunity of aſcertaining a circumſtance about which I could get no information from any perſon in the family, namely, whether Sir Francis had laid hold of Major Gordon before the piſtol was fired." I accordingly aſked him, " Did you actually ſeize upon Gor-
" don, before he fired the piſtol?" " Sir Francis anſwered
" Yes." " Good God, Sir Francis (ſaid I) how could
" you be ſo fooliſh as to attempt to lay hold of a man in
" a ſtate of ſuch furious inſanity, and with arms about
" him?" Sir Francis replied, " There would have been
" no danger, if the ſervants had done their duty." This converſation made ſuch an impreſſion upon me, that I inſtantly retired to a corner of the room, took a card out of my pocket, and wrote it down. Have you preſerved that card? Yes, I have it in my pocket.

When did you firſt ſee Major Gordon after the accident, and in what ſtate did you find him? I ſaw Major Gordon on Friday the 17th of April in Haddington Jail, in company with Mr Goldie and Mr George Somner. My reaſon for going to ſee him was to afford him every aſſiſtance which I could, as I underſtood that, ſince he had left Gilmerton, no medical perſon had ſeen him. I found him confined in a ſtrait jacket; but walking about the room. His countenance looked wild and furious: His eyes were red and inflamed: He was very much agitated; ſpoke of the horrid accident which had happened, in terms of the greateſt regret: He complained of much confuſion and noiſe in his head; he was correct enough when his attention was fixed to any ſubject; but it was impoſſible to do this for above a minute at a time, his ideas quickly wandering to other things; and he aſked the ſame queſtions more than once. I did not ſtay with him above a quarter of an hour. But his looks and converſation, at this time, appeared to me

to be thoſe of a perſon juſt recovering from a fit of mania.

Had you occaſion to ſee the Major in Edinburgh Jail, and to remark any thing particular in his appearance, or behaviour, while there? After Major Gordon was brought to Edinburgh Jail, I ſaw him frequently, at leaſt once a day. He was at times very melancholy. At other times, his appearance was like that of a maniac; particularly, on Sunday the 26th of April. I went to ſee him that forenoon, in company with Major John Mackay; as, from the wild appearance of Major Gordon the preceding day, Major Mackay wiſhed to have ſome perſon along with him. Immediately when I ſaw him, I perceived a difference in his appearance from that of the day before.—His countenance was wild, his eyes ſtaring, and like thoſe of a mad perſon: and his walk was hurried. He, however, behaved very compoſedly to us for a few minutes: but, when Major Mackay wiſhed him to repeat before me, ſome circumſtances of a private nature, which he had mentioned the day before, Major Gordon could not recollect that he had told Major Mackay any ſuch things as he alledged; and, when Major Mackay repeated the converſation he alluded to, he ſaid that the Major had no right to enquire into his private affairs, and that the Major betrayed a confidential diſcourſe. He became much agitated, he looked very wild; and he put himſelf into ſuch violent and threatening poſtures, that both Major Mackay and I were very much alarmed.—His appearance and behaviour, ſeemed to me to be the more ſingular, as at that time he was confined to a very low diet. Upon this occaſion, I remarked to Major Mackay, that, if the ſame ſtate continued, it would be neceſſary to put Major Gordon in a ſtrait-jacket.—On the third of May I went to England; and therefore did not ſee him for five weeks.

Had you ever any converſation with the late Sir David Kinloch reſpecting Major Gordon, from which you could underſtand that Sir David conſidered the Major as occaſionally deranged? I have had frequent converſations with the late Sir David Kinloch, reſpecting Major Gordon, and

have

have sometimes heard Sir David mention several oddities in the Major's behaviour; and Sir David has often said to me, "Poor, unhappy man! he is much deranged."

Mr Hope. My Lord, I propose now to call Dr Farquharson; and I have the pleasure to add that he will be the last witness. We have, indeed, many more in waiting; but, on consulting with my brethren, I think it unnecessary to give the jury further trouble, both because it is impossible to add strength to the evidence already brought, and, because, judging by myself, the Court and Jury must be very much exhausted. With this gentleman, therefore, we shall close our proof.

Dr WILLIAM FARQUHARSON, *Member of the Royal College of Surgeons in Edinburgh examined by* Mr RAE.—How long have you been acquainted with the pannel Major Gordon Kinloch? Six years. On what occasion did you become acquainted? I was called to him in September 1789, in Mrs Warden's Grass-market, where I found him sitting in a small bed room, with one of his wrists wrapped up in a handkerchief, which was very bloody. He was in such a state of agitation, and mental derangement, that he could hardly give any account of his wound; though he hinted, that he had hurt himself by pushing his hand through the window of a carriage. This appeared impossible from the nature of the wound; and the gentleman, who had called me to see him, told me, that the postilion suspected the Major had wounded himself while in the carriage; and in this opinion we were confirmed, by searching his pockets after he was put to bed, and finding a small knife, the blade of which was bloody; and still more, by his evading any enquiry on the subject, though he never denied it. Do you think, that his derangement was occasioned by the wound? No. I found him so much agitated,—and his looks were so furious, that I concluded his disorder proceeded from actual derangement, more especially, as the coolness of his skin, and the calmness

of his pulſe, did not indicate a ſufficient degree of fever, to account for the ſymptoms.

How long did he remain in Wardens? Several days. I got him removed to a houſe at the head of the Cowgate, occupied by a Mrs Cameron, who kept boarders.—How long did you attend him? About two months. Was he deranged all that time? For the firſt month, he was very unſettled, being at times more rational, and at other times quite ſulky and deranged, though in a gradual ſtate of convaleſcence; and it was about two months before I thought it ſafe for him to leave town.

Did you ever ſee in the paſſage any other ſymptoms of derangement? Yes. About the firſt of April laſt, I met the Major coming along the North Bridge very faſt, but ſometimes ſtopping, and looking down. He was paſſing me; I ſtopped him, and had ſome converſation in which he appeared very incoherent. After parting, he turned, and called on me On my coming back he looked ſeveral minutes over the parapet of the North Bridge, towards the caſtle, and, appearing ſtill more agitated than before, ſuddenly exclaimed, "Good God will that man," (alluding to a gentleman whom he named) "do nothing for himſelf?" On my expreſſing ignorance of his meaning, he ſaid "Will he not go out "of the world like a Gentleman? I have adviſed him to "it, as the only thing left for him to do; but I am afraid "he has not ſpirit." From this, and the whole of his appearance and converſation, I was afraid that the Major would do ſome miſchief to himſelf. This fear I expreſſed to Dr James Home; and I afterwards underſtood, that he mentioned it to ſome of the Major's family.

When did you ſee the Major next? In Haddington jail. What ſtate was he in? He was in irons, and did not ſeem to underſtand his ſituation properly; for, inſtead of touching upon the accident, which occaſioned his being there, he began immediately to complain of the irons hurting his feet, which were gouty.

Have you ſeen him ſince he came laſt to Edinburgh? I have viſited him almoſt every day ſince he was in Edinburgh jail. How have you found him? I have found him

frequently

frequently much agitated. I never could get him to reſt upon one ſubject for many minutes at a time, excepting the melancholy accident; but even from this he would ſometimes proceed abruptly to the moſt trifling, and totally unconnected ſubject; and, on one occaſion, in the courſe of a converſation about the accident, happening to obſerve an uniform button on my coat, he ſeized it like a child, and aſked if he could not have a ſet like it. On the Saturday after his being brought to Edinburgh, I found him very ſulky, going about the room in great wrath, and complaining of Major Mackay's having uſed him ill, in deſiring him to apply for counſel and an agent to make his defence. He ſaid this was a thing which nobody had any thing to do with, and he would make no defence; and it appeared very clearly to me, that at this time he did not know what was meant by a defence. Sometime afterwards, on being informed that Mr Hope and Mr Bremner had been employed, he aſked upon what authority, was very ſulky, and ſaid he did not underſtand how any perſon ſhould be employed for him without his own conſent.

Did you ever hear the pannel regret, that he was not prevented from committing the unlucky deed? He has frequently, in my hearing, expreſſed his regret and aſtoniſhment, that he was not prevented.

Were you requeſted to uſe your influence with the pannel, to prevail with him, to give ſuch information as might aid his defence? I was, but could not make him underſtand the neceſſity of giving any information, and accordingly, none was obtained from him.

Did he uſually make rational anſwers to any queſtions you put to him? I have often found great difficulty in getting any anſwers at all; and, when I did, they were generally from the purpoſe.

Dr. FARQUHARSON, *croſs examined by the Lord Advocate.* When you attended the pannel at Warden's, had you occaſion to know that he had ſwallowed a large quantity of laudanum? On ſearching his pockets, a large phial of laudanum was found, not quite full; but whether he had

ſwallowed

ſwallowed the whole of what the phial had contained, I cannot ſay,—though, from the ſmell, I believed that he had taken ſome of it,—perhaps a good deal more then an ordinary doſe. I could, however, obtain no information on the ſubject from himſelf; either during the period of his convaleſcence, or ſince. Did you ever caution him againſt the uſe of laudanum? No. Did you find him tractable? In general I did, though ſometimes I was obliged to uſe ſtrong expreſſions; but he did every thing he was deſired, except to take the quantity of bark and wine, which I thought neceſſary for healing his arm.

Had you any converſation about naming his counſel? While I was with the pannel in Haddington Jail, Mr Fraſer's clerk came in with a line, which (in conſequence of previous information from Mr Fraſer) I underſtood to be a recommendation to appoint counſel and an agent. On this, I left him and the clerk together; but, in a ſhort time, I was again ſent for by the Major, who ſhewed me Mr Fraſer's letter, and aſked my opinion of it.—I approved of Mr Fraſer's ſuggeſtion; and, on the Major's heſitating as to whom he ſhould name, from his not being particularly acquainted with any counſel, I propoſed to get an almanack and examine the liſt of the Faculty. We accordingly procured an almanack; and, in the courſe of reading over the liſt, the Major named the Dean of Faculty, and Mr George Ferguſſon. I afterwards underſtood, that he wrote to both theſe gentlemen, though I am certain, that he recollects nothing about his having applied to Mr Ferguſſon, and recollects the application to the Dean, only in conſequence of his having received an anſwer to it.—He aſked me what was the meaning of an agent. This I endeavoured to explain, but found it impoſſible to make him underſtand the neceſſity of employing one.

* * *

The Exculpatory Proof being cloſed, the *Lord Advocate* roſe, and addreſſed the Jury in ſupport of the proſecution. His Lordſhip commenced his ſpeech at about half-paſt four o'clock on Tueſday morning.

LORD ADVOCATE's SPEECH.

Gentlemen of the Jury,

THE duty which you are ſummoned to diſcharge as a ſpecial jury, is of the moſt important nature. I ſhould be ſtating what is not true, and what it would be very improper for me not to mention to you, that an alteration has taken place in the cloſe of the evidence, which conſiderably changes the appearance it had at its commencement.

The preſent caſe is not one which in its nature is attended with any conſiderable degree of difficulty; or where the rules of determination are not plain and obvious: But I ſhould be departing from that which I have always done, and which I ſhall always continue to do, in every criminal trial, were I to conceal from you what I really feel, that the evidence in favour of the unhappy perſon at the bar, has ultimately come out ſtronger than I was aware of, or expected when I came into this Court.

The Counſel who early in this trial opened the defence with that elegance and propriety for which he is ſo remarkably diſtinguiſhed, was pleaſed to ſtate that this was *a moſt neceſſary proſecution.* He ſtated no more than is true, and what you muſt all feel to be ſo; for ill indeed would the criminal juſtice of this country be attended to, and much would thoſe, whoſe buſineſs it is to proſecute offences, be wanting in their duty, if the life of a fellow-citizen were to be taken without enquiry, and his blood permitted to flow, without a Jury determining on the guilt or innocence of the perſon accuſed of having done ſo.

My brother, Mr Hope, in the courſe of a debate which aroſe betwixt us, in relation to the admiſſibility of certain notes propoſed to be given in evidence on the part of Miſs Kinloch, was pleaſed to ſtate, that, if he ſtood on the oppoſite ſide of the bar, he would not, as I did, have oppoſed the reading of the notes; and added, that he would rather have abandoned the proſecution. Gentlemen of the Jury, I am of a different opinion. I ſhould have violated every rule and principle of juſtice, if I had dared to diſ-

triminate between the case of this gentleman, and that of the poorest criminal who ever stood at the bar, or have suffered my feelings for his wretched and unhappy sister, to lead me from the strict line of my duty. Though the pannel has not, through my persisting in the objection, been deprived of the benefit of his sister's evidence, whatever force it may have had on your minds, and however much I might have regreted had her distress incapacitated her from giving her testimony in Court, yet, far from abandoning the prosecution on that account, I would without hesitation have called upon you to have given a verdict according to your consciences from the evidence before you; nor would I, though I might have lamented the circumstance which occasioned her absence, have consented to an exception in her favour over other witnesses, or have thought that, by resisting the demand made for her of referring to notes, the smallest degree of blame could justly be imputed to me.

Having stated these preliminary observations, I come next to the matter of fact. The Counsel for the pannel is pleased to say, that the killing is admitted. I could not accept the admission: It is proved. And I should offer an insult to your understandings, were I to utter a single word on the complete sufficiency of that part of the evidence.

To the evidence then we come, of what truly is the cause before you: Is the defence of insanity proved to that extent, and degree, which law and reason require, in exculpation of the crime of murder?

The Law of Scotland is, and must in this respect be the same with the Law of England, because both are founded in the plainest and most obvious principles of justice. It is such as entitles the person who kills his fellow-creature to the full benefit of the defence of insanity, if he can prove it on a fair trial; but I do say, under correction of the Court, that it is only he who is absolutely insane, who is perfectly mad or furious, that is free from trial, and consequently free from punishment.

He that is subject to temporary fits of complete and perfect madness, cannot in like manner be punished for the actions he

he commits in the midſt of his delirium; but, for thoſe committed in his lucid intervals, he is, with exceptions unneceſſary for you to attend to at preſent, as competent to trial and puniſhment, as any other man.

But there is a third deſcription of perſons, and to this I requeſt your particular attention, for it is the deſcription under which the preſent caſe falls; I mean that degree of derangement which has been attributed to the pannel; that degree of melancholy and depreſſion of ſpirits, which, tho' it may border on inſanity, is nevertheleſs accompanied with a ſufficient ſhare of judgment to diſcern good from evil, and moral right from wrong; which never has, and never can be ſuſtained as a bar to trial, or a defence againſt puniſhment for a crime ſo atrocious as murder; but ſubjects ſuch perſons to conviction and puniſhment, as much as if no ſymptoms of derangement had ever appeared, or as if complete evidence had been laid before you, that he was in a lucid interval, and in the full poſſeſſion of his ſenſes when the action was committed.

It is unneceſſary for me, eſpecially at this hour of the morning, to multiply authorities, in ſupport of what muſt appear on the very ſtatement of it, conſiſtent with law and with reaſon. I could refer to ſeveral; but ſhall confine myſelf to two ſhort quotations from two eminent authors, one of this, and the other of our ſiſter kingdom; I mean Sir George M'Kenzie in this country, and Lord Chief Juſtice Hale in England; not only becauſe they are known to be writers of the higheſt authority in each country, but becauſe they ſtate the law and the reaſons of it with ſo much perſpicuity, that no man can be at a loſs to underſtand it; and he has only to enquire how far the evidence is or is not ſufficient to eſtabliſh the legal defence in the particular caſe under conſideration. Sir George M'Kenzie obſerves, "Such 'as are furious are not in the conſtruction of law capable 'to commit a crime, Stat. 2. Rob. II. for the law compares them to infants, or to dead men, *L. Si quis, F. de acquirend. hered.* to ſuch as are abſent, *L. ſed ſi F. de injuriis*, and makes them to be no more guilty, becauſe of the crime they commit, than a ſtone from a houſe, or a beaſt, is 'to be reputed guilty, and puniſhable for the wrong they do.

Quam

' *Quam ſi pauperiem pecus dederit, aut tegula ceciderit, L. 5. F. ad L. Aquil.* And the law commiſerates ſo far their condition, that it expoſtulates with ſuch as would purſue them for a crime, *et non exigas penas ab eo, quem fati infelicitas excuſat, quiq; furore ipſo ſatis punitur, L. infans F. ad L. Corn. de ſicar.* They are excuſed by their own misfortune, and abundantly puniſhed by their own fury; but ſince the law protects furious perſons from puniſhment, becauſe they want all judgment, *L. 14. F. de officio præſid. it follows naturally, that this privilege ſhould be only extended to ſuch as are abſolutely furious.*"

He then proceeds in the ſubſequent ſection, which I am about to read, to conſider the caſe of perſons who are only mad to a certain degree; and ſtates, as a queſtion of doubt, the old doctrine argued by ſome writers on the civil law, but long ago juſtly exploded, that though they are not free from puniſhment altogether, yet that, by the rule of proportion, their puniſhment ought to be mitigated. " 2. It ' may be argued, that ſince the law grants a total impunity ' to ſuch as are *abſolutely furious*, that therefore it ſhould, ' by the rule of proportion, leſſen and moderate the puniſh- ' ments of ſuch, as though they are not abſolutely mad, yet ' are hypochondriack and melancholy to ſuch a degree that ' it clouds their reaſon, *qui ſenſum aliquem habent, ſed dimi- ' nutum*, which lawyers call *inſania*, and the Greek μωρωσις. ' 3. That ſuch as ſhew any act of reſentment or revenge in the ' wrong they do, may be puniſhed with ſome degree of ſeve- ' rity, ſince they ſhew ſome degree of judgment. But yet the ' *Parliament of Paris* is juſtly condemned by all lawyers, for ' having cauſed execute a madman who had killed one that ' had ſtruck him two days before; but, ſince he did ſhew ' memory and revenge in that act, he might have been pu- ' niſhed juſtly to ſome moderate degree."

From the ſtile of this paſſage, and manner of expreſſion, you, Gentlemen, will readily obſerve, that the caſe which Sir George M'Kenzie here ſtates as dubious, not whether it is exempt from puniſhment altogether, but whether the ordinary or a leſs ſevere one is to be inflicted, is the very caſe of the pannel at the bar; and ſince for that queſtion there is now no room, as the priſoner either is liable

liable to a capital, or to no punishment at all; you are bound, according to the evidence before you, either to find him not guilty, if you believe that he was, at the moment he took his brother's life, absolutely furious or insane; or, if you think he knew the nature of his crime, to return a verdict of guilty against him.

The only other author I shall refer to, is Chief Justice Hale. He says, P. 1. c. 4. § 2. "*Dementia accidentalis, vel adventitia*, 'which proceeds from several causes, sometimes from the 'distempers of the humours of the body, as deep melancholy, 'or adust choler; sometimes from the violence of a disease, 'as a fever or palsy; sometimes from a concussion or hurt 'of the brain, or its membranes or organs; and as it comes 'from several causes, so it is of several kinds or degrees; 'which, as to the purpose in hand, may be thus distributed: '1*st*, There is a partial insanity of mind; and 2*d*, A total 'insanity.

"The former is either in respect to things, *quoad hoc vel illud insanire*; some persons that have a competent use of 'reason, in respect of some subjects, are yet under a parti-'cular *dementia* in respect of some particular discourses, 'subjects or applications; or else it is partial in respect of 'degrees; and this is the condition of very many, especially 'melancholy persons, who, for the most part, discover their 'defect in excessive fears and griefs, and yet are not wholly 'destitute of the use of reason; and this partial insanity 'seems not to excuse them in the committing of any offence 'for its matter capital; for, doubtless, most persons that are 'felons of themselves, and others, are under a degree of 'partial insanity when they commit these offences: it is very 'difficult to define the indivisible line that divides perfect 'and partial insanity; but it must rest upon circumstances 'duly to be weighed and considered, both by the Judge and 'Jury, lest, on the one side, there be a kind of inhumanity 'towards the defects of human nature; or, on the other side, 'too great an indulgence given to great crimes: the best 'manner that I can think of, is this; such a person as, la-'bouring under melancholy distempers, hath yet, ordinarily, 'as great understanding, as ordinarily a child of fourteen 'years hath, is such a person as may be guilty of treason or 'felony."

In

In another passage, this author proceeds to state: "Now, 'touching the trial of this incapacity, and who shall be adjudged in such a degree thereof, to excuse from the 'guilt of capital offences; this is a matter of great difficulty, partly from the easiness of counterfeiting this disability, when it is to excuse a nocent, and partly from the variety of degrees of this infirmity, whereof some are sufficient, and some are insufficient to excuse persons in capital 'offences.

"Yet the law of England hath afforded the best method 'of trial, that is possible, of this, and all other matters of 'fact, namely, by a jury of twelve men, all concurring in 'the same judgment, by the testimony of witnesses *viva* '*voce*, in the presence of the Judge and Jury, and by the 'inspection and direction of the Judge."

This then is the material, and indeed the only question you have to try, whether the person at the bar is of that description, and whether the evidence adduced is sufficient to warrant the conclusion, that he was deranged to such a degree, as to excuse him from the capital punishment due to a heinous murder. It is my duty to submit to you such observations, as appear necessary for aiding you in this enquiry: And I must begin by presuming to point out to you those parts of the evidence which do not bear upon the defence, and to which, in my opinion, you ought not to attend: I mean the evidence of the gentlemen near me, who, much to their honour, seem, at much personal inconvenience, to have come from a considerable distance, from the service of their King and Country, to discharge the best and most benevolent of all duties, that of giving their testimony in favour of their unfortunate fellow-soldier and friend. Permit me, however, to tell you, Gentlemen, that you must dismiss their evidence totally out of the question. Colonel Twentyman and Captain Miller have both proved, that, before 1779, the pannel was beloved by all, possessed many excellent qualities, was polite, humane and generous; but that a fever in the West Indies totally changed his disposition, and deranged his understanding: The derangement I admit. But it is the degree of derangement that you are to consider; and, unless you are prepared to go this length, and to say that from the 1779 downwards, to the night of this melancholy event, he was occasionally, and at the time

of

of its happening, so completely deranged as to fall under the description of perfect and total insanity, you cannot possibly exculpate him: But the evidence of his family, and those most intimate in it, completely contradicts such a supposition: For, however whimsically and absurdly he may from time to time have conducted himself, we have not heard of any thing being done by them, or even proposed to be done regarding him, which can induce you to believe that they really thought him insane. He left his father's house from time to time, without previous notice, or mentioning whither he was going: You find him returning again as unexpectedly, and, in a variety of other particulars, acting with a great degree of absurdity, but which neither did in fact, nor was considered by any of his family, as amounting to madness. He made two visits to Colonel Twentyman at Lincoln, where he behaved absurdly enough, it is true; but he returned to his own family, and to the management of his own affairs, without any steps being even proposed to be taken, or being judged necessary for the purpose of confining him. The story told by Major Mackay, of his having, some years ago, at Northberwick, taken a sudden and idle whim into his head, that the Major had made him the butt of the company, is just of the same description, and seems to have passed just as much unnoticed by all the family. But it will be recollected, and it seems material, that, on a question explicitly put to Mr M'Millan, whether the pannel was able to distinguish good from evil, he answered in the affirmative; an opinion confirmed by the fact, that though the pannel had been liable to fits of temporary insanity, still that was but partial; as it cannot be supposed that his family, when they saw the fit approaching, would not otherwise have taken measures to secure him, and prevent him from injuring himself or others; which, with the exception of the circumstance deponed to by Dr Farquharson, on which I shall have occasion to remark hereafter, no person concerned with him seems ever to have thought necessary.

Miss Kinloch and Mr Fraser have also told us of other circumstances in the pannel's conduct, but all of them of a similar nature; of her father, on a journey to Wooler, having observed that Gordon's malady was returning; and that, on another occasion, he had taken into his head a notion

tion that he had signed a renunciation of his right of inheritance to the estate of Gilmerton.

But, upon reviewing all these circumstances, there is one thing which always occurs, and which must strike you forcibly, that you find him living in his father's house, without any steps being taken that make it appear his family looked upon him to be insane. You find him, during his father's life, frequently leaving Gilmerton in a hurry, without telling where he was going; but who is there that will venture to assert this sort of capricious conduct to be in any means a proof of insanity? It is needless for me to go over this part of the evidence, so I shall not repeat one word of it; but I shall only say, that, though it may prove a sort of derangement, it does not amount to that degree of it, which, on the authority of Lord Hale, and in sound law and reason, can alone render him unaccountable for his actions.

As to his jumping out of the chaise, and leaving the company on the road to Gilmerton, it is your business to consider how far that is a mark of derangement. You will observe, that he returned a rational answer to the postilion who was sent after him, viz. "He was going to Haddington, and he would be found there."

You find him, from the evidence of Dr Farquharson, attempting, some years ago, his own life; but I am much afraid, that you will not look upon an attempt to commit suicide, as a proof of insanity. We have heard of this being done by those who never were either suspected, or accused of insanity, and who, to the last fatal act, were cool, collected, and in the full exercise of their faculties. It is impossible for me, however, not to admit, that the evidence of Dr Farquharson does go directly to establish, at this period, a fit of strong, decided insanity; and it is for you to consider and determine what weight that circumstance can have on the present trial, and whether that solitary instance is sufficient, in your opinion, to fix upon him the character of madness, in the face of, and when contrasted with all the other evidence, to which I have already alluded, and which still remains to be considered.

We

We had, if I recollect right, one or two other instances of excentrick behaviour in the pannel as far back as the year 1786. Still, however, they were but instances of extreme absurdity; and still, in my humble opinion, does the compleat neglect paid by his family to these appearances, preclude any supposition of insanity.

There was a story that Fraser told you about a bill, which the pannel had remitted him in payment of a debt, on which, after satisfying the debt, a balance remained due, and had been paid to the pannel; but which, at the distance of three or four years, the pannel conceived had not been returned to him; but, when the matter was explained, he instantly acknowledged his mistake, and seemed hurt and vexed at the explanation he had demanded. This at the utmost infers only a defect of memory: But, could it admit of being carried further, the answer still is the same, that the degree of derangement was not such as to induce his friends even to propose the putting him in confinement.

But the circumstance which I consider of the most importance, and of such moment, that I must state it to you as of the utmost consequence, is, that, immediately after he had committed the action, he seems to have had perfect knowledge of what he had done, and was perfectly aware of the consequences of it. The servants have all concurred in deponing, that, when thrown on the carpet, he said he would give them L. 100 to let him go; and soon afterwards exclaimed that he had done an awful thing. When visited next morning by Mr Goldie, he enters with him into a discussion of what happened; he endeavours to vindicate himself upon the plea of self-defence, by telling Mr Goldie that there was a deliberate plan laid to destroy him.

From the testimony of Fraser, it appears, that he was all along capable of transacting business. You have it both from Smith and Dodds, the first of whom carried him on Wednesday evening to Haddington jail, and a few days thereafter accompanied him to Edinburgh, and the last of whom saw him frequently in Haddington, and carried messages to and from Mr Fraser, that he was always collected and rational; at no time do I find him awakening as it

were from a dream, to the recollection of what had passed during his delirium, and of which he was ignorant while totally deprived of reason. In the testimonies of Dr Monro and Mr Bell; you have complete evidence that, during their attendance, they saw no symptoms of madness about him. In short, if I can discover no moment of time at which total insanity commenced, I can see no period when returning reason resumes her reign: That he has method in his derangement, and that he does not converse like a madman, is evident; he has complete recollection as to circumstances that happen some time before; and though he may reason absurdly, still he does reason, and understands the consequences of what he has done, and the cause of his confinement.

Gentlemen, the question you are to determine comes to this short and simple issue: If it appears that the pannel was in a situation of knowing good from evil, you cannot acquit him. If you do not think that he was perfectly and truly ignorant of what he was doing; if you shall believe that he knew murder to be a crime, you must be of opinion that he is answerable for his actions, and consequently liable to punishment.

It remains for me only to offer a few remarks on the only two instances which appear to me to be proved of any thing resembling that insanity, which can afford a relevant defence against the crime of murder; the one deponed to by Dr Farquharson, the other by Walker and Reid. That they are entitled to weight, and to your serious consideration, it would be as unjust as unavailing for me to deny. To your own consideration I chiefly leave them: But calling upon you particularly to consider, and to judge, whether they proceeded from drunkenness, or any other cause imputable to the pannel himself, or were really the consequences of unavoidable insanity.

That this is an essential and material distinction, into which you must accurately enquire, cannot need the aid of argument or authority. Lord Hale tells us, "The 'third sort of *dementia*, is that which is *dementia affectata*, 'namely, *drunkenness*. This vice doth deprive men of

'of the uſe of reaſon, and puts many men into a perfect, 'but temporary phrenzy: And therefore, according to ſome 'civilians, ſuch a perſon, committing *homicide*, ſhall not be 'puniſhed ſimply for the crime of homicide, but ſhall ſuffer 'for his drunkenneſs, anſwerable to the nature of the 'crime occaſioned thereby; ſo that yet the formal cauſe of 'his puniſhment is rather the drunkenneſs, than the crime 'committed in it: But, by the laws of England, ſuch a per-'ſon ſhall have no privilege by this voluntary contracted 'madneſs, but ſhall have the ſame judgment as if he were in 'his right ſenſes."

He then ſtates two exceptions; the firſt, "If a perſon, *by 'the unskilfulneſs of his phyſician*, or *by the contrivance of his 'enemies*, eat or drink ſuch a thing as cauſeth ſuch a tem-'porary or permanent phrenzy, as *aconitum*, or *nux vomica*, 'this puts him into the ſame condition, in reference to crimes, 'as any other phrenzy, and equally excuſeth him." And the ſecond is, where an habitual and fixed phrenzy is occa-ſioned by the fault of the inſane perſon, in which alſo the defence of inſanity is good. But from both, it is clear, that a temporary and partial inſanity, occaſioned by the act and deed of the party accuſed, is not of that nature as to free him from trial and puniſhment, for offences committed dur-ing the ſubſiſtence of ſuch criminal delirium.

It is your buſineſs, Gentlemen of the Jury, to enquire and decide, whether theſe two inſtances are not to be aſcribed to the pannel himſelf, and to the influence of laudanum. It is clear from Dr Farquharſon's evidence, that the firſt of the two was imputable to a doſe of laudanum voluntarily taken by the pannel: And the evidence of Miſs Kinloch, joined to the teſtimony of Reid, who ſaw him on the Tueſday evening, with a phial, in which a ſmall quantity of high coloured liquid remained, afford convincing evidence that his deranged ſtate muſt have in a great meaſure, perhaps wholly, been owing to the ſame cauſe. Had he, on this laſt occaſion, for the firſt time experienced the effects of that doſe, even then, would the authority of Lord Hale have applied to his caſe, and diſabled him from pleading the delirium as an ex-cuſe. But, having once, on a former occaſion, ſuffered ſo ſeverely, he muſt have known, and is to be preſumed to have

have known, when he swallowed the second, that similar consequences must inevitably follow; and it is for you to consider, whether that circumstance does not oblige you to hold him still more directly accountable.

To myself, Gentlemen, it appears to be proved, that the pannel was, from the West India fever downward, often in a state of derangement, but that attended with a sufficient degree of reason; and that from the year 1779, till he appears early on the Tuesday morning at the house of Beanston, or, at furthest, till he appears on the preceding Sunday at Mr Goldie's manse, there is not the smallest vestige of proof, to satisfy you that he was in that state of lunacy, which alone can entitle you to sustain the defence. The evidence of Miss Kinloch, of Walker, and of Reid, as to his conduct and demeanour for the two days previous to the fatal act, is of a nature different from what appears at an earlier period; and upon its weight and sufficiency you will, giving due attention to the observations I have made, determine with impartiality, and according to the dictates of your own conscience.

Gentlemen of the Jury, I have thus gone over a case which I stated in the outset as attended with some degree of difficulty, and on what that difficulty is founded I have endeavoured to explain. It is but fair I should acknowledge, that there are many circumstances attending his conduct during the 48 hours prior to the event, which are favourable to the defence; and the evidence of Dr Home, of what passed betwixt him and the late Sir Francis, is of the same nature. It is for you, Gentlemen, to consider what weight these circumstances ought to have, when contrasted with those which I have already suggested for your consideration. If he had been really insane, it certainly was the duty of his friends to have taken long ago the necessary and proper steps for having him secured; even still, they have not advised him to plead that in defence. He admits that he is sane and well at this moment, and that he is competent to stand trial before you. The rapidity of his recovery from the alledged state of insanity, and the very short duration of it, if it existed at all, or to a sufficient degree to exculpate, are now the subject of your impartial and serious deliberation.

To

To thoſe falſe, idle, and indecent reports, which I underſtand have been circulated out of doors, reſpecting this trial, you, Gentlemen, will pay as little attention as I do. You know your duty too well, and what juſtice requires of you, to be biaſſed on either ſide in a queſtion of this nature, or to be influenced by any thing but the evidence laid before you. We were told, to the aſtoniſhment of us all, in the commencement of this trial, that even the pulpit itſelf had been made the channel of miſrepreſentation. Be the man who he may, ye cannot but join in feeling indignation at his folly and indecency, who dared on the eve of a ſolemn trial to anticipate the verdict of an impartial jury, or touch upon a ſubject which I thought every man had felt to be ſacred from diſcuſſion. Gentlemen, if any of you have heard theſe reports, or liſtened to ſuch a preacher, I am ſenſible you will diſregard them; you will look only to the evidence before you, and decide upon it like honeſt men.

That the evidence has come out more favourably for the defence, than I had reaſon to expect, a feeling of juſtice has already compelled me to acknowledge. Where the force of theſe is weakened, and what are the topics, to which you, on the part of the public, ought to attend, I have endeavoured to point out: Should the reſult be, to balance the whole nearly equally on your minds, God forbid, that, where the life of a fellow-creature is concerned, I ſhould attempt to perſuade you, were the attempt likely to ſucceed, that the ſcale ſhould not be inclined to the ſide of mercy.

Mr HOPE's SPEECH.

My Lord Juſtice Clerk, and Gentlemen of the Jury,

I FEEL myſelf greatly agitated. I have waited with extreme impatience for the preſent moment; and, now that it is come, I wiſh I may have either ſtrength or recollection to give utterance to the multitude of ideas which crowd upon me: the ſubject really overcomes me, and I hardly know how or where to begin.

You have heard a very ingenious ſpeech from the learned Lord, and I muſt in juſtice add, a very candid one; a ſpeech, in point of candour, juſt what I expected, and every way becoming his honourable mind: Indeed, his candour ſeemed to be at variance with his duty and abilities, and evidently betrayed him into inconſiſtencies, which even his eloquence could not diſguiſe. But, before proceeding to reply to him, or to give you my own obſervations on this caſe, there is one preliminary view of it which I cannot refrain from giving you, becauſe it has made the ſtrongeſt impreſſion on myſelf: It is indeed affecting beyond meaſure, and teaches how vain and fleeting are even thoſe enjoyments here, which we are the beſt entitled to call our own.

Gentlemen, I deſire to call to your remembrance the honourable teſtimony which you have heard of the priſoner's character prior to 1780, and to contraſt it with the ſubſequent melancholy change. See him entering early into the army, the ſecond ſon of an honourable houſe, himſelf poſſeſſed of an independent fortune, embracing the profeſſion of a ſoldier, for glory, not for profit, and devoting himſelf to the ſervice of his country, only for his country's ſake: See him entering into that profeſſion, of all reſpectable profeſſions the moſt reſpectable, himſelf the moſt reſpected officer in the line. You heard the character which was given of him by thoſe who knew him well, who have come from the extremities of the Iſland, to which the ſummons of this Court could not have reached them, voluntarily, to ſupport a fellow ſoldier in diſtreſs, and who, by doing juſtice to his character for friendſhip, generoſity, benevolence, humanity, and every ſocial and amiable accompliſhment, have, in the moſt decided

ed manner, proved their own title to ſhare in the praiſes they beſtowed. "Beloved and eſteemed in his own regi-'ment by both officers and men, reſpected by the whole 'line, and in every point one of the moſt amiable characters 'they ever knew," were the words of his companions: Noble and generous friends! I know not whether to admire moſt, yourſelves who give, or your now unhappy friend who deſerves ſuch teſtimony.

Such was Major Gordon, when in 1780 he ſailed to the Weſt Indies, to that malignant and accurſed climate, which has been the grave of millions, and which ſeems to have been ceded to Europeans by the wrath of Heaven, to be a ſcourge and puniſhment for the horrid barbarities they have acted there. Such was he, when he ſailed, commanding a regiment of his brave countrymen, all flouriſhing like himſelf in youth, and health, and ſpirits. View now the diſmal melancholy change: By heavens! I cannot bear it; O God, thy ways are juſt, but ſure they are inſcrutable! If virtue, honour, and humanity, ever deſerved thy favour, or entitled their poſſeſſors to ſucceſs and proſperity in this life, as well as happineſs hereafter, ſurely the priſoner would have been the object of thy care: But let me not blaſpheme, thy purpoſes muſt be ſerved, thy will be done.

Turn then, Gentlemen, to the ſad reverſe. View the priſoner now ſtretched on the bed of ſickneſs and of phrenzy; nurſed and attended by thoſe friends who have here borne teſtimony in his favour, and whoſe friendſhip, the danger of contagion could not deter from adminiſtering to his relief. View him, by their care, reſtored again to life, only to curſe the care which had ſnatched him from the grave. View him now returned to Britain, alas! how changed; changed, not in reaſon only, but in his very nature; the whole man abſolutely loſt; and the amiable and generous Gordon Kinloch, become the ſullen, moroſe, jealous, and troubleſome being, which he has ſince occaſionally exiſted. See him often a plague and affront to that family of which he was once the flower; ſee him ſhunned and avoided as a peſt, by thoſe very perſons who once courted his company, and thought themſelves honoured by his friendſhip; ſee him wandering from his father's houſe, coming he knows not whence, going he knows not where, but

but in all places an object of terror and aversion. View at last the concluding scene of this sad tragedy,—his brother fallen by his hand,—himself now answering for his murder; think on this sad change, and let it make you serious; think on the prisoner's fate, then think of the blessings which yourselves enjoy, and let it make you grateful.

But, Gentlemen, mistake me not; think not that I have thus appealed to your feelings, because I have need of your compassion. I desire not mercy, unless you can give it me with justice; I do not think I have occasion to throw the picture I have drawn into the scale; though surely, if the scales were even, it would indeed turn the balance. I have dwelt on this subject, not so much for the prisoner's sake, as for our own. It has taught me a lesson of humility, which I shall not easily forget, and which none of you perhaps may be the worse to learn. It may teach us all to acknowledge, what all already know, that even our characters are not our own, and that our very virtues, as well as the faculties and powers of the body and mind, are subject to disease, to alteration and decay. It may teach us, too, how uncertain and worthless a reward is often human praise. At the other end of the island, Parliament is now employed in erecting a monument to one great man, who, perhaps fortunately for himself, died in that infernal climate; while you are desired to doom to death and infamy one not less amiable, who unhappily survived it.

But I will not longer distress your feelings, to which I have no occasion to appeal; neither will I waste your time in guarding you against those prejudices, which I know you must have imbibed in consequence of the innumerable and infamous calumnies which were propagated on this subject. If you had brought the most inveterate prejudices into Court, I am sure they must soon have been effaced; for certain I am, that the first two hours of this trial, if not sufficient to clear the prisoner, were enough to convince you how vilely he has been abused; by none more than by myself; not, indeed, by propagating the calumnies which I heard, but by too easily believing them: Believing to such a degree, that I at first refused to be his Counsel; and at last only consented at the request of a common and respected relation. But the very first enquiry which I made into this affair, satisfied

fied me, how much injuſtice I had done the priſoner, and I truſtthis day that I ſhall make him reparation.

Gentlemen, fatigued as we are, I ſhall not trouble you with going into the evidence in detail. I ſhall take the great features of this cauſe, referring to the particulars of the evidence, only in ſo far as may be neceſſary to confirm the arguments which I ſhall advance.

But, before proceeding to the evidence, it is neceſſary to ſay a word, and but a word, on the law as laid down to you by the learned Lord: I ſhall not pretend to enter the liſts of definition either with the learned Lord himſelf, with M'Kenzie, or with Hale; they are all great and able men; but I ſuſpect much that they are better lawyers than phyſicians, and that they have given way too much to a profeſſional propenſity to ſubdivide and methodiſe. For my part, I ſhall not attempt to reduce madneſs to fixed rules; nor to define the different kinds and degrees of it, which I have always found to be as numerous and diverſified as the unhappy perſons who were the ſubjects of the diſorder. I ſhall not ſpeak to you in technical language, which none of us probably underſtand, and which, unapplied to particular caſes, and unexplained by examples, conveys to my mind no poſitive and preciſe ideas. Indeed, after all the learned diviſions and ſub-diviſions of M'Kenzie and Hale, they are both obliged to confeſs, that, theſe notwithſtanding, the Jury muſt judge from the circumſtances of each particular caſe. For my part, I think there is but one juſt and practical obſervation on this ſubject in either of their works: That, whatever may be the general and ordinary degree or ſymptoms of the diſorder in the patient, if a total inſanity be upon him at the time, it excludes the poſſibility of guilt or of puniſhment. This is common ſenſe, and it can be reduced into practice. By this rule I deſire you to try the priſoner; and, if you wiſh for a definition either of the kind or degree of his inſanity, you will find a better one in the evidence before you, than in the abſtract and ſpeculative definitions of M'Kenzie or Hale. If you wiſh for the *kind* or ſpecies of his madneſs, the witneſſes will tell you, it was of that kind as to make them apprehend miſchief either to himſelf or to others; to make *him* apprehend plots, and miſchief,

and danger from all around him, particularly his beſt friends, which Dr Monro told you was the never-failing and ſtrongeſt ſymptom of entire madneſs. It was of that kind that made Somner ſay, he had no doubt that he would have ſhot any perſon who attempted to ſeize him; it was of that kind, which made Fraſer think him "*dangerous to* '*mankind.*" Deſcriptions like theſe, from perſons who witneſſed his behaviour, are worth all the diviſions and definitions of the learned Lord, and his two learned authors.

If you wiſh for the *degree* of his diſorder, it is in ſome meaſure implied in the above deſcription of its kind, and can be further read in the advice which every perſon gave to confine him, and in the preparations which the family had actually made for coercion. Indeed, his madneſs ſeems to have paſſed *degrees*, and to have arrived at its *criſis*, as Fraſer emphatically termed it.

If therefore, Gentlemen, you are ſatisfied, from a review of the evidence, that his caſe does correſpond with the above deſcription of it, you will acquit the priſoner, although you ſhould not find his caſe to agree exactly with the preſumptuous definitions of the lawyers: Preſumption indeed! to attempt to trace the infinite varieties of a diſordered imagination, which, even in its ſound and natural ſtate, is the moſt boundleſs and unfettered faculty of the human mind. We, Gentlemen, will purſue a humbler and a ſafer path; and, inſtead of endeavouring to arrange, and claſs, and define and limit madneſs, we will endeavour to trace its progreſs and effects in one individual unhappily afflicted with it.

I ſhall now, Gentlemen, proceed more directly to the caſe; and I wiſh firſt to call your particular attention to an argument and admiſſion of the learned Lord, while it is freſh in your recollection, and of which I wiſh you never to loſe ſight. It is deciſive of the caſe for the priſoner; and I was aſtoniſhed that the learned Lord could dwell on the topic ſo long, without obſerving the fallacy of his argument.

He admitted that it was proved by a variety of witneſſes, particularly the gentlemen from England, that the priſoner

prisoner had been frequently deranged to a very considerable degree. But he contended, that their testimony must be thrown entirely aside; because, whatever was the actual degree of derangement to which the pannel had formerly been liable, his relations, who are proved to have known of it, did not conceive it to be total or dangerous, because it was proved that they had never thought of taking any measures for securing him. Now, this certainly proves, as the learned Lord has justly stated, that his derangement had never before, (except in the instance sworn to by Dr Farquharson), amounted to total and absolute insanity—That his disease had never before come to a *crisis*, to use the emphatical words of Mr Fraser—That his relations were not afraid of mischief from him, at least to others. But, because he never *before was* totally and dangerously insane, could any person have justly concluded that he never *would* be so; or is it any proof that he was not *at the time* of this accident? I admit, in the words of the learned Lord, to which I beg to refer you while they are fresh in your recollection, that his derangement on former occasions does not appear to have made such an *impression* on the family, as to suggest to them the propriety or necessity of adopting any mode of coercion. I admit with the learned Lord, that the impression which his family had of his former attacks, is the best evidence we can have of their nature and degree. In this admission, I perfectly agree with my learned friend. I desire to press it most earnestly upon you, for it is an admission from which I will not suffer him to depart. But, if the impression which his disease made on his family on former occasions, is to be evidence that he was not totally mad, what will the learned Lord make of the impression and conduct of the family on the last occasion? What will he make of the very same impression entertained by every friend of the family? What will he make of the advice which they received from those friends, whether of the profession or not? If the impression which his situation made on the family is to be evidence, and it certainly is the best, then what was their impression at the time of the melancholy event? Is it not proved that every member of the family was convinced of the absolute necessity of immediately securing him? Is it not proved that every friend who saw him was of the same opinion? Is it not proved

proved that they gave the family, and in particular Sir Francis, information of their opinion, accompanied with the moſt earneſt and decided advice? Was not this advice ſeconded by their medical friends, who, to the common obſervation of mankind, added the certainty of ſcience and experience? Did not this impreſſion travel with the priſoner from place to place? Wherever he was ſeen, did not perſons, without communication or concert, inſtantly conceive the ſame opinion of him? He is ſeen in Edinburgh as early as the 28th March by Dr Home and Dr Farquharſon, who communicate their obſervations of his malady to each other. Dr Home informs Sir Francis, who inſtantly tells him he had obſerved the ſame. The priſoner goes to Gilmerton; his ſituation is remarked by his ſiſter, who communicates it to Mr Somner; but ſhe only tells Somner what he had obſerved before. He goes to Mr Goldie's, who forms a decided opinion that he ought to be ſecured; Mr Goldie goes to Gilmerton to impart this opinion to Miſs Kinloch, who meets him only by telling him that ſhe had already anticipated his advice, and had ſent for Somner. Somner and Fraſer come to Gilmerton on the Monday morning, and not only adviſe, but urge and expoſtulate with them on the neceſſity of ſecuring him. At laſt, on the fatal night, Walker ſends from Beanſton a meſſage by Reid, to ſend up all the ſervants for that purpoſe; and Reid, in the very act of delivering the meſſage, is frightened by the priſoner's appearance. In the courſe of the evening, M'Millan interpoſes with ſimilar advice, and obtains permiſſion to write for Somner; and how does he write? he writes as of a matter perfectly familiar, and of which they were all perfectly aware. He deſires him to come immediately, and bring with him *what is neceſſary*. Does this appear vague and inexplicit to Somner? Is he at any loſs to interpret it? No; and how does he interpret it? he underſtands it at once to mean a keeper and a ſtrait waiſtcoat; ſo well did he know what the family thought, and what they had intended to do. When he comes with the apparatus, does he retract his advice, or do the family alter their opinion? Is their "impreſſion," to uſe the learned Lord's favourite word, altered or diminiſhed? No; Somner continues to adviſe, and they to reſolve: not ſatisfied with the aſſiſtance in the houſe of three or four men ſervants, beſides a poſt-boy from Haddington,

Haddington, they send for three labourers from the farm. Here is another impression for the learned Lord, an impression of danger, as well as of necessity. They must have seen ten thousand circumstances in his behaviour, which cannot be conveyed to you by description, before it would have been thought necessary to take such precautions as these. But we are told that the farm servants were dismissed, and this is given as a proof that coercion was abandoned. If it was, the event only proves that it was most *foolishly* abandoned; but the contrary is proved; it is indeed true, that the labourers were dismissed, under the delusion of a momentary calm; but is it not proved, that in a few minutes they were again convinced of the necessity of coercion? Is it not proved, that, after his first appearance in the parlour, the servants were called in, and desired to be in readiness in case of his return. When he did return, and Sir Francis followed to secure him, I have no doubt that he expected to find the servants standing ready to assist; indeed this is clear from what, in his dying moments, he said to Dr Home; not finding them there, he attempted it by himself, and by his other brother Alexander; and well might he acknowledge, it was madness to do so.

Such, then, was the impression of the family on this occasion of the absolute necessity of securing him. Had it been an "*impression*" only, I should have maintained it to be good evidence, even although, from false delicacy or other motives, it had never gone beyond an impression. But, in fact, you see them so perfectly satisfied that their impression was right, that they proceeded to act upon it, by making most wise and salutary preparations, and then spoiling all by an injudicious and ineffectual attempt.

But their *attempt*, though fatal to themselves, is sufficient for me. It is better than even the learned Lord's "impression;" and proves to demonstration, that they were fully satisfied of the truth of the opinion they had formed, both on the degree of his derangement, and the necessity of coercion.

And now, Gentlemen, in the face of all this evidence, in opposition to the opinion of every friend who saw him; in

oppoſition to the advice of every profeſſional perſon conſulted on the occaſion; in oppoſition to the impreſſion of the family, to the attempt of Sir Francis; you, ſitting here, wanting the ſtrong evidence which they had, his eyes, his looks, his geſtures, his tones, his whole demeanour; you ſitting here, I ſay, are deſired preſumptuouſly to determine, that all, all were miſtaken; that the priſoner was not mad, and coercion not neceſſary; and this you are deſired to do;—Why? Becauſe he killed his brother! Wonderful concluſion! If any thing was wanting to confirm the evidence ariſing from the opinion of the family, that fatal event puts it beyond doubt. If it could be doubted whether Sir Francis too thought him totally deranged; I anſwer, he has ſealed his opinion with blood. They had been taking precautions all night againſt danger and miſchief from the priſoner; and, when the dreaded miſchief happens, it is given you as a proof that their precautions were unneceſſary; admirable logic! That they apprehended danger is clear.—Why? They have told you becauſe they thought him mad; the miſchief happens; and that which they dreaded as the natural conſequence of his madneſs, you are to take as a proof of the ſoundneſs of his underſtanding.

Gentlemen, I am tired with dwelling upon this topic. The defence ariſing from the conduct of the family is ſuch, that I cannot conceive what anſwer can be made to it. The learned Lord, I am ſure, can make none; for, the argument was his own, and moſt ſincerely do I thank him for it. For my own part, I think we have proved much more than we were bound to do; for, if there had been ten times leſs evidence of inſanity by others, and in other reſpects, I think the conduct of the family would be evidence enough.

Gentlemen, this leads me to put a queſtion to the learned Lord, of which he does not ſeem to be aware. He has contended that the priſoner's malady was mere melancholy and depreſſion of ſpirits—that he was not mad—was in the perfect knowledge of right and wrong—knew friends from foes—and was perfectly conſcious of the nature of a crime. What then muſt the learned Lord ſay of the attempt to confine him? Is he prepared to ſay, that Sir Francis and the family were in a foul conſpiracy againſt the priſoner? that

that they were attempting againſt him a crime little leſs horrible than that of which he is accuſed? Is he aware, that the priſoner's conduct would then have been completely juſtifiable? for, if there is any crime or attempt in nature, which may be repelled by the death of the aggreſſor, it is a conſpiracy and attempt to confine, as a madman, a perſon who is not ſo. The learned Lord was not aware of this dilemma; but I will relieve him from it. He never dreamt, more than I, of charging Sir Francis with ſuch a crime; and therefore he muſt concede to me, that the priſoner's ſituation juſtified the means that were attempted to ſecure him, and, if ſucceſsful, would have juſtified his confinement. I aſk no more; and, if the caſe had been my own, I would have reſted it here. But I am too much intereſted to omit other circumſtances, though not ſo material; and therefore, tired as we are, I think it my duty to proceed.

Gentlemen, I have not yet done with the impreſſion of the family; the attempt of the family to confine the priſoner, is not only good evidence of derangement in general; but what the learned Lord obſerved, of their having formerly neglected to do ſo, proves to demonſtration, that they never would have made ſuch attempt, but from the moſt overruling and cruel neceſſity. If the impreſſion of the family is evidence of the exiſtence of derangement in general, it muſt alſo be good evidence of the *meaſure* of that derangement: indeed the learned Lord has ſo pleaded it, and I intreat you to keep him to his argument; I again repeat, that I entirely agree with him, that the circumſtance of the family never having on any former occaſion taken meaſures for confining the priſoner, is the beſt evidence, that, in all the former inſtances which fell under their obſervation, they did not think the malady arrived at ſuch a height as to require coercion.

But what concluſion is to be drawn from that circumſtance, with reference to their conduct on the late occaſion? If they did not attempt to confine him formerly, becauſe they did *not* think him ſufficiently deranged to require ſuch meaſures; then, their attempting to confine him on the late occaſion, ought and muſt be held as good evidence that they *did then* conceive his malady to be arrived at that *criſis* (as

Fraſer

Fraſer expreſſed it) which rendered coercion neceſſary, both as the means of cure and the means of ſafety. If an argument is to be drawn from the conduct of the family, as deſcriptive of their opinions, that argument muſt be allowed to make for the priſoner as well as againſt him. The family, on former occaſions, ſays the learned Lord, did not think the priſoner *totally* deranged, becauſe they neither attempted nor intended to take meaſures for ſecuring him. The family, on the laſt occaſion, *did intend*, and actually *attempt* againſt the priſoner, the moſt marked and deciſive means of coercion; and therefore, they *did*, on this occaſion, conſider him to be *totally* inſane. This is ſound argument and ſound ſenſe, unleſs my underſtanding too be woefully deranged.

Gentlemen, the conduct, however, of the family, becomes much ſtronger evidence of the meaſure and degree of the malady, when the nature of the diſeaſe, and the feelings of the family, are conſidered. Madneſs is a diſeaſe, which the family would not be very willing to admit, and ſtill leſs to proclaim; the fever, which was the cauſe of it, happened abroad, and ſeems to have been little known in this country; for which reaſon the family might juſtly be apprehenſive, that the world would conceive the malady to be of the hereditary kind. I ſay, therefore, it is a diſorder which you will not preſume the family would be very willing to admit; you will not preſume that they would make any unneceſſary expoſure of their friend's misfortune, when they were ſure that the world, with a moſt uncharitable perverſeneſs, would turn his misfortune to the family's diſgrace. When, therefore, you ſee the family attempting deciſive and public meaſures againſt the priſoner, you may ſafely conclude that it was not unneceſſarily done. No ſlight, no common degree of derangement would drive them to meaſures ſo repugnant to their feelings, ſo repugnant to their intereſt. This would have been the fair preſumption, even if there had been no evidence of the feelings of the family on the occaſion; but it is not left to preſumption; it is proved inconteſtably, that the family did know and feel how deeply their honour and their intereſt were concerned in the meaſures they were taking. Sir Francis ſeems to have been particularly alive to the diſtreſſes of their ſituation. Has not Fraſer proved to you, that, when he urged him, in the garden on Monday forenoon, to ſecure

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the prisoner, (his malady, in his opinion, being then come to a *crisis*, as he emphatically expressed it,) Sir Francis seemed much concerned: But concerned for what? Was it for the prisoner only? No; A good man like him could not but feel concern for a brother in such a situation. That would never have struck Fraser at the time, and still less would it have occurred to him to mention it now: but he added, that Sir Francis seemed to feel it as a *family affront*. These were his words; and so much did the witness consider Sir Francis's concern as arising in part from that cause, that he has sworn, he thought it necessary to expostulate with him on the subject, and to remind him of the variegated nature of human affairs, and the imperfect state of happiness below.

And is Sir Francis the man, whom you are to suppose would, within 24 hours, not only direct, but himself personally attempt, a measure which he considered thus to be affronting to his family, without the most decided and determined conviction of the necessity of the painful step which he found himself compelled to take? Still, however, you see that he could not divest himself of his feelings; the family affront still appears to have dwelt on his mind, and to have produced that fatal irresolution, that false delicacy, that criminal lenity, I had almost called it, which was the true cause of the unfortunate event. We find him directing his confinement one moment, and countermanding it the next; at one time sending for the assistance of the farm servants, and then dismissing them on the most equivocal appearance of abatement in the disorder, or rather on the fallacious symptom of a temporary calm; and at last, when he did attempt it, doing it in such an undecided and ineffectual manner, as clearly proves the confusion and disorder of his own mind, and how much his feelings were struggling with his duty. Had Sir Francis been as firm and determined in conducting the attempt, as he was convinced of the necessity of it, the prisoner might now have been blessing him for his kindness, instead of lamenting his loss, and blaming his indecision. Infatuated conduct! unaccountable, but on the supposition of a struggle between his feelings and his conviction: for what else could make him trifle and hesitate, after he had once taken his resolution, but his extreme aversion to incur this

family affront! But, however fatal that irresolution was to him, however cruel to the prisoner, however much I may, as a man, join with the prisoner in deploring the indecision of his brother, yet, as his counsel, I did rejoice to hear it: it proves, beyond the power of cavil or of sophistry to obviate, with what extreme reluctance Sir Francis yielded to the advice of his friends, and the conviction of his own senses: it proves how completely he must at last have been convinced of the necessity of coercion, before he brought himself to attempt it: it proves that he apprehended still greater disgrace to the family from his brother being at large, than could arise from his confinement: it proves that he did not attempt to secure him, till he not only saw that the affront was unavoidable, but that censure and disgrace would fall on him, if he resisted longer the conviction of his mind: he failed in the attempt; but the attempt proves his conviction, and his last breath bore testimony to the necessity of his conduct.

Gentlemen, were the cause my own, I would leave it here. I can never strengthen it; I cannot foresee what answer can be made to the evidence arising from the conviction of the family; if there were no more in the cause, I must prevail; prevail, by the admission of the prosecutor himself, for the evidence arising from the conviction of the family, was his own argument, and I have only made the proper application of it.

But, Gentlemen, on the part of the prisoner, we have gone a great deal farther; you have the clearest proof of the opinion of the family, and you have your notes before you; I desire you to say, if either there, or in your memories, you can find one circumstance, tending even to a suspicion, that the opinion of the family was wrong, that their measures were unnecessary, that the prisoner was not insane: I know you cannot; on the contrary, I could prove to you, that every one circumstance, which has appeared in evidence, tends more strongly than another to justify the opinion of the family, and to prove the prisoner's complete insanity, had the conduct of his friends been less convincing on the subject.

I

I will not weary you, Gentlemen, by detailing the evidence, becauſe, I think I ſee that you are already with me; allow me only to recall to your recollection the leading circumſtances of the caſe. Firſt let me aſk you, Gentlemen, is there any thing *improbable* in the allegation that the priſoner was inſane? Was he an unlikely perſon to be inſane? Or was he not juſt ſuch a man, as, to uſe his father's prophecy of him, would one day be confined; had not inſanity become in him an habitual diſeaſe? Was not his ſyſtem prediſpoſed, I think they call it, to this diſorder? Had it not a moſt adequate and melancholy cauſe? Will it be ſaid that a Weſt India fever does not often leave behind it occaſional derangement? Will it be ſaid, that it did not do ſo in the preſent inſtance? Look back upon the evidence of his brother-ſoldiers, who firſt diſcerned the effects of the diſeaſe; a body of evidence, which I was not at all ſurprized to hear the learned Lord deſire you to lay out of view. Mark the progreſs of the diſorder; has it not been proved, that his family and friends thought it growing on him? Did it not once before end in confinement? and is it ſo extraordinary that it ſhould end in it again? Is it not natural, nay, is it not proved to you, that repeated attacks of inſanity weaken and unhinge the mind? Is it not known, that the mind in that ſtate preys upon itſelf, and that every attack of the diſorder is in itſelf, in ſome degree, a cauſe of its return? Are you ſurpriſed to find inſanity, even without a cauſe, in one who had been occaſionally ſubject to it? Are you ſurpriſed to find a total inſanity, in one who had been often partially deranged? But has not the cauſe of the preſent attack been proved; or, at leaſt, has it not been traced back to a ſtroke which his mind had very lately received? Within leſs than two months of the accident he had loſt his father; it is proved that he loved him with the moſt filial piety; it is proved that he paid him uncommon attention during his laſt illneſs; it is proved that he was extremely affected by his death. Were it neceſſary, I might argue that this is no trifling ingredient in this cauſe; a man who has ſhown ſuch warmth of affection for an aged parent, at a time when thoſe inſtincts are ſuppoſed to be much effaced, is not the man, whom, in two ſhort months, you would expect to find the wilful murderer of his brother. I have no occaſion, however, for an argument like this,

this, and therefore shall not dwell upon it; but it is proved that he was uncommonly affected by his father's death: Gentlemen, we have all suffered the loss of dear relations; I hope we too have felt all that nature ought to feel. But, we met those afflictions with sound minds and vigorous understandings; we were capable of receiving the consolations of business, of philosophy, and of religion, and of allowing them all their proper force; we gradually resumed our relish for friendship and society, and were comforted: but can any of us pretend to say, what effects such afflictions might have had upon us, if we had met them with a mind, weakened, unhinged, and shattered by previous calamity? had insanity been lurking in our system, can we say, that such affliction might not have called it into action? That it did so with the prisoner, is proved beyond a doubt: It produced, at first, as was most natural, uncommon depression of spirits, not mere ordinary grief, but what the prosecutor himself admitted, did amount to real, but partial derangement; this was followed by an uncommon agitation of the nervous system, not arising from intoxication (as it seemed once attempted to be proved, though it has been since abandoned,) but from the progress of his distemper; this was accompanied with a restlessness, an incapacity to remain any time in one place, and a desire to wander and hurry about, which would of course increase the agitation and irritability of the system, till, by a complication of causes, it ended in the delirium and insanity which is our present defence. Is there any thing unnatural in this? Does the effect not correspond with the cause? Is not the *disorder* just what you would have expected, from a mind so previously unhinged? Were not the *consequences* just what you would have expected from a mind so totally deranged? His friends and family thought him dangerous both to himself and others; had the mischief happened to himself, as it is too plain he intended, who would have been surprised? But is it less surprising that it should happen to another? *Both* were *equally* dreaded by his family; else why bolt their doors, and why so much preparation of assistance when it was resolved to seize him? The friends apprehended danger from his insanity, and when the danger happens, which they dreaded, it is given you as evidence that their fears were vain; amazing conclusion! That the very circumstance, which, if there were

were any doubt of his insanity, is of itself almost enough to prove it, should be considered as throwing doubt and perplexity on a case, in which every soul concerned has told you that they had none; every witness who saw him recently before have told you, that they dreaded mischief from his insanity; the mischief happens, and then the insanity is denied!

I think, then, Gentlemen, I have shown, that the opinion of his family is completely corroborated by the probabilities of the case; and that both the disorder itself, and the fatal effects of it, are exactly such as were to be expected from the previous habits and situation of the prisoner's mind, unhinged by disease, shattered by repeated attacks of derangement, and at last shocked by a grievous and recent affliction.

Let us now enquire, Gentlemen, if the state of his body, if his actions and his conduct correspond with the opinion which his family had formed.

On the subject of the state of his body, some questions were put at an early period of this cause, by two gentlemen of the jury, who from those questions I perceived were gentlemen of the profession. I am not myself qualified to judge, whether the circumstances they alluded to are or are not proper and decisive symptoms of derangement. But I conclude that they are good judges; and I desire you only to judge of the prisoner's condition by the questions which they put. One of them put this question to Mr Somner, If want of sleep, and an uncommon capacity to resist the calls of hunger and the impressions of cold, were not usual and decided symptoms of insanity? Mr Somner told you, that his experience of the disease did not enable him to give a decided answer. Still less does mine, although I certainly have heard, that those are usual and strong marks of madness. I presume at least that the gentleman thought so, who put the question.

Let us now then examine his situation, with a view to this question, and see what answer it suggests.

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As to want of ſleep, it is proved beyond all controverſy, that this was his *conſtant* complaint. Miſs Kinloch has proved, that on Sunday he was wandering the whole night up and down the houſe of Gilmerton, from room to room, and toſſing himſelf on every bed. When his brother and M'Millan ſaw him at Haddington on Monday, at the time when Somner brought him to the inn, it is proved, that when his brother aſked him how he did, he anſwered, "Oh, 'Sandie, I am very ill, I cannot ſleep." It is proved, that late on Monday evening, he made his eſcape from them, as they were carrying him to Gilmerton; and it is alſo clear that he had wandered in the woods all that night. It is therefore eſtabliſhed, that, for two nights at leaſt previous to the accident, he had not cloſed his eyes, beſides the *conſtant* complaint of want of ſleep, to which he had been previouſly ſubject. Walker at Beanſton, indeed, ſeems to think that he ſlept ſome hours while in his houſe; I think this extremely doubtful, from the condition in which Walker found both the priſoner and his room, when he went up to waken him. But let it be held that he ſlept at Walker's, I will yield that to the proſecutor; but ſtill it is proved, that want of ſleep was his conſtant complaint. It was probably both the cauſe and the effect of his diſeaſe; and, if he did ſleep at Beanſton, and yet awoke in the outrageous ſtate which Walker and Reid have deſcribed, it only proves more ſtrongly the ſettled and ſerious nature of his malady, which gained ground, notwithſtanding a comfortable ſleep, the moſt likely and effectual means of producing an abatement. Whether, therefore, he ſlept or not, is indifferent to me; if he ſlept, and yet awoke more deranged and outrageous than ever, the more violent and decided muſt be his inſanity. If he did not ſleep, then it accounts for the degree and progreſs of the diſeaſe. But for me it is enough to ſhew, that want of ſleep was his conſtant complaint, and that, in fact, he had not cloſed his eyes on Sunday and Monday night. Follow him to Gilmerton, and you will find the ſame complaint. When Sir Francis had ſeen him to his room, and aſked him how he did, he anſwered him by complaining that he could not ſleep nor reſt; and, in point of fact, you find that he was ſpending that night in the ſame reſtleſs and agitated ſtate as the two preceding, for, at

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three in the morning, when the accident happened, he had not closed his eyes, and was wandering through the house. If then, Gentlemen, want of sleep be a symptom of insanity, as I do believe it to be, both from my own information, and from the question put by one of yourselves, I think it is proved in this case to no ordinary degree. But I also believe that want of sleep is not only a symptom of insanity, but contributes powerfully to the progress and violence of the disease; in which case, this circumstance acquires additional importance, and fully accounts for the disorder having made such rapid progress in so short a time.

Now, as to his resisting the calls of hunger, we could have brought complete evidence on this subject, if our fatigue had admitted of it; for, we have every person in waiting in whose house he had been for at least a week before. But enough is proved, to establish that one of his symptoms was a total want of appetite. Dr Home and Dr Farquharson have proved, that a total want of appetite was one of his complaints some time before he left Edinburgh; and, to come nearer the fatal event, I think you have every reason to believe, that he had not tasted food for at least 48 hours preceding. Mr Goldie has proved to you, that he arrived at his house from Dunbar about half past three on Sunday; consequently his last meal that day, must have been his breakfast at Dunbar. He refused to eat at Mr Goldie's; and, though he asked for a little toddy, that witness has told you that he was unable to carry it to his head. He remained with Mr Goldie near two hours; and, before he arrived at Gilmerton, it is proved that dinner was over, that he refused to eat, and in fact he took nothing but a little brandy and water that night. On Monday morning it is clear that, instead of food, he had taken poison, to counteract which, he was made to drink several gallons of hot water, a circumstance which would add to the debility of his system. He left Gilmerton on Monday about two; and, after going half way to Edinburgh, he returned to Haddington, where Somner brought him to his brother and M'Millan, and there it is proved that he could not eat, although pressed to do it; at night he made his escape from the chaise, and, after wandering in the woods all night, arrived

arrived at Walker's at Beanſton about five in the morning; and Walker has proved that he had nothing there but a ſawcer full of tea; ſome toaſted bread was brought, but he could not eat it; from that he went home to Gilmerton, when it is proved, that though he once aſked for meat, he could not eat it when it was brought.

If, then, a want of appetite for food, be another ſymptom of infanity, in what ſtronger degree would you wiſh it to be proved?

Patience of cold is ſtated as another ſymptom; do you deſire evidence of that? See him wandering all night through the houſe of Gilmerton almoſt naked; and, if that will not ſatisfy you, follow him to the woods of Beanſton, and there view him, "ſtretched out and bleaching in the northern 'blaſt."

Let, then, the Gentleman of the Jury who put that queſtion receive his anſwer, that patience of hunger, cold and ſleep, are ſymptoms of infanity, and that they concurred in the priſoner to no ordinary degree.

So far then, I ſay, that the opinion and impreſſion of the family is again confirmed by the ſtate of the natural functions and appetites of the body, as well as the tenor of his mind.

Now, look to his actions and his conduct, to his demeanour and whole behaviour, from which every profeſſional man has told you that infanity is moſt eaſily perceived. But alas! Gentlemen, all theſe circumſtances, which made ſuch impreſſion on the witneſſes, are loſt upon us. Deſcription fails us here; language cannot deſcribe looks, and geſtures and demeanour; there is indeed a language of the eye, but it can be expreſſed only by the eye, and, when that is not ſeen, the impreſſion cannot be conveyed. You have indeed been told of the wildneſs of his looks; but you cannot conceive this by deſcription, nor can you underſtand the *degree* of wildneſs, otherwiſe than by its effects on thoſe who

who saw it, *they* believed him, from his looks, to be totally deranged, and *you* must believe *them*.

As to his gestures and demeanour, turn to the evidence of Fraser, of Walker, of Reid, and Somner. I will not follow them minutely. But you cannot have forgot Fraser's description of his loading the blunderbuss on Monday forenoon. But surely the loading of a blunderbuss or pistols, by a person just stepping into his chaise for a journey, is in itself neither an uncommon nor a terrific occurrence; and yet Fraser told you he was in the greatest alarm, and expected every moment to see the blunderbuss levelled at himself. What alarmed him, I say? Not the mere loading of the blunderbuss. But he had marked his mad demeanour. It was his eye, his looks and gestures, the terrible agitation of his whole frame, which was soon afterwards observed by Somner, even when the prisoner was half concealed by his chaise. All these things gave both these gentlemen the most decided conviction of his insanity; and their opinion ought to carry conviction to you, for it is their *opinion* in this case to which you ought to give weight, and not to their description, which can give no adequate idea of his condition and behaviour.

Recollect also the numberless circumstances to which Somner has sworn. Begin with the scene at Haddington; view the prisoner wandering from the room to the yard, from the yard to the garden, from the garden to the street, from the street back to the room, in such a manner and such a condition, that you see it was thought necessary to give the ostler orders to watch him. See him next on his road to Gilmerton, whither his friends were carrying him for the best of purposes, making his escape from the chaise in the middle of a dark and dreary night. From what and to what did he escape? He escaped from his best friends, from those who meant his good, from his only means of cure, to wander in the woods of Beanston, and dwell with the beasts of the field. And yet this is the knowledge of good and evil, of friend and foe, which you are desired to believe, although I observed that the prosecutor never once ventured to put those questions, after the remark which I made upon them during the examination of Mr Somner.

But let me proceed with the depoſition of that gentleman. Follow him on the fatal night, and you will find his account of the priſoner's behaviour pregnant with innumerable proofs of the moſt decided inſanity. His perpetual reſtleſſneſs, his incoherent converſation, his threats to ſhoot Somner at the head of the ſtairs, his affection for Sir Francis at one moment, his ſuſpicion that he had poiſoned him the next, his wandering through the houſe half naked, and laſtly his frantic and outrageous geſtures, when he came down to the parlour firſt, when the final reſolution was taken to ſecure him, and again at the time of the infatuated and ineffectual attempt.

If theſe circumſtances in his conduct are not thought ſufficient to ſupport the opinion attempt and of the family, turn to the evidence of Walker and of Reid, and you will find abundant confirmation; I will not repeat what they have told you; they were among the laſt witneſſes, and I ſaw the ſtrong impreſſion which their evidence made on the whole Court: one circumſtance only I will mention, the viſion of the light from Heaven and the burning buſh; viſions ſuch as this, are the conſtant effects of a diſordered imagination, and the horrors of them never fail to increaſe the inſanity by which they are produced.

I leave the reſt of Walker and Reid's evidence to your own recollection; I am ſure it made a ſufficient impreſſion on you, and I think I may venture to ſay, that not one of you would have changed places with them, to be Lord of the Britiſh Empire.

But, Gentlemen, extend your views beyond the fatal event, and you will find that the impreſſion of the family continued exactly the ſame; What was their firſt inſtinctive movement? Was it to apprehend a felon? No; It was to ſeize, overpower, and ſecure a madman, it was to carry into execution the attempt which Sir Francis had ſo egregiouſly miſmanaged, in ſhort it was to apply the ſtrait waiſtcoat, and thus, in the ſtrongeſt manner, eſtabliſhed the opinion of the family on the nature of the deed.

From his behaviour, however, after the accident, the learned Lord has drawn the only thing like an argument in ſupport

support of the prosecution; he argued, that he could not be insane, because, after the event, he recollected what he had done; but, Gentlemen, that by no means disproves his insanity. The most complete insanity is not attended with a total loss of memory; else how could madmen remember their keeper, and those circumstances which make them stand in awe of him. Nay, in some points, the memory of madmen is most perfect and tenacious; they never forget an injury, they never forget their revenge; but, Gentlemen, the recollection which the prisoner showed of the fatal event, must be taken altogether, and then the argument founded on it falls instantly to the ground. How did he recollect the event? Did he recollect it as it really happened? Did he recollect it unconnected with those frantic notions which he had previously conceived? What did he say to the servants who seized him? he called out to them to let him alone, for he had not an hour to live: Does not this prove that he was still under the impression, that his brother had poisoned him? Remember too, what he said to Mr Goldie, That he had been poisoned, and that there was a deliberate plot to murder him that night, and that what he did was in self-defence. And yet this is the recollection from which the learned Lord would infer the soundness of his understanding. Dr Monro, however, who knows a little more of insanity than either of us, gave you his opinion, that such groundless jealousies and suspicions against friends and relations, was a constant and certain mark of perfect madness. What the prisoner therefore said of the event, must be considered more as the creation of a disordered imagination, than the impression of a sound and sane memory. But, says the learned Lord, we find him perfectly recollected a few days afterwards in Haddington jail; and he seemed to treat so rapid a recovery as impossible. But, first, I deny that he was perfectly recollected. He may have been so at times; but Dr Farquharson has expressly told you that he found him often very incoherent; As to his rapid and perfect recovery, I wonder in what part of the proof the learned Lord found that; Dr Monro, and Mr Bell, indeed, who visited him only for a few minutes once or twice a-week, did not observe insanity; but they most candidly and scientifically told you, that this could afford no proof that he might not be often incoherent at other times; accordingly Drs Hume and Farquharson, who saw

him

him daily, ſometimes twice or thrice, have told you that he continued to be frequently deranged; nay, did not he once behave in ſo outrageous a manner as to determine Major Mackay never to return to ſee him? did not he ſay ſo to Dr Home, as they went down the ſtairs of the priſon? and did not the Doctor anſwer, that it would be abſolutely neceſſary to apply the ſtrait waiſtcoat, if he continued equally outrageous? What, therefore, could the learned Lord mean by a rapid recovery? That, in ſome ſhort time, he grew comparatively better; that now, at the diſtance of two months, he is, thank God, as well as his grief and ſorrow, and anxiety, will permit him, is true; But that his recovery was ſo rapid and extraordinary as to throw doubts even on the exiſtence of his diſorder, I am ſure that no man who hears me will believe.

But the learned Lord, in this, fell into a manifeſt inconſiſtency; he has now argued that he could not be *very* much deranged at the fatal moment, becauſe he became ſo ſoon well; but the learned Lord was pleaſed, in another part of his ſpeech, to make a much more rapid recovery for the priſoner, than that which he has treated as impoſſible. He ſeemed very candidly to admit, that his behaviour at Walker's at Beanſton was ſuch, that, if he had committed miſchief on him, it could not have been murder, on account of his inſanity.—This was about ſix o'clock in the afternoon; and yet, by three next morning, that is in nine hours, he ſuppoſes ſuch a rapid recovery as to make that murder then, which would have been madneſs at Beanſton. This is a cure infinitely more wonderful, than the priſoner's recovery!

I will not, Gentlemen, dwell a inſtant on the caſe of Lord Ferrers.—It agrees in no point with this, but that the word madneſs occurs in both; Lord Ferrers did not fail in proving that he had been occaſionally deranged, but he failed totally in proving that he was deranged at the time, or rather it was clearly proved that he was in his perfect ſenſes; but we have not only proved previous derangement to no ſlight degree, but a derangement at the time, gradually increaſing till it ended in a criſis of delirium; Lord Ferrers was proved to have acted from the moſt determined revenge, and to have laid his ſchemes in the moſt deliberate manner;

manner; while, previous malice in the prisoner here, though once attempted to be proved, is now expressly given up; and, as for deliberation, it is absurd to talk of it. In short, while justice and law exist, the cases of Lord Ferrers and of the prisoner will ever be regarded as in exact opposition and contradiction to each other.

I think I am now, Gentlemen, drawing to a conclusion. I think I have marked the great and leading features of this case, to which it is proper for you to direct your attention; many things I have no doubt omitted; some indeed I have omitted by design, for I wished not to distract your attention from the leading circumstances of the case; and, relying on the goodness of my cause, I wish you to retire, before you are completely exhausted; for, the sounder your judgment, the more certain my success. I am indeed confident. It is not usual for a counsel to deliver his own opinion, nor perhaps is he entitled. But the example has been set me, and perhaps even my opinion may carry some weight and authority along with it; perhaps also I owe it in justice to the prisoner, for having once listened to the calumnies against him; with truth then and pleasure I can say, that the very first day's enquiry which I made into his case, effaced the prejudices I had conceived. My opinion has every day grown stronger in his favour; and now, laying my hand upon my heart, and as I hope for mercy at the throne of heaven, I can say, that, in my conscience, I believe him innocent.

Lord Justice Clerk's Charge to the Jury.

Gentlemen of the Jury,

That Sir Francis Kinloch was killed by the hand of the pannel, is proved beyond a doubt; you have therefore to consider the defence on his part set up. Now, it will occur to any man of sound sense and judgment, that there are different degrees of insanity.

If a man is totally and permanently mad, that man cannot be guilty of a crime; he is not amenable to the laws of his country. There is no room for placing the pannel in that predicament; for, as a person, totally and absolutely mad, is not an object of punishment, so neither is he of trial.

The next insanity that is mentioned in our law books, is one that is total but temporary. When such a man commits a crime, he is liable to trial; but, when he pleads insanity, it will be incumbent on him to prove that the deed was committed at a time when he was actually insane.

There is still another sort of distemper of mind, a partial infanity, which only relates to particular subjects or notions; such a person will talk and act like a madman upon these matters; but still if he has as much reason as enables him to distinguish between right and wrong, he must suffer that punishment, which the law inflicts on the crime he has committed. You have therefore to consider the situation of the pannel, whether his insanity is of this last kind, or whether he was, at the time he committed the crime, totally bereaved of reason. For, if it is your opinion from the evidence, that he was capable of knowing that murder was a crime, in that case you have to find him guilty.

Gentlemen, this is a question of some nicety. You have the testimony of certain witnesses, that he was correct and coherent in his answers; and you have, on the other hand, evidence that he was totally deranged by a fever in the West Indies. In regard to a later period, the conduct of the family with respect to him, is also to be considered.

It

It has been observed for the prosecutor, that no steps were taken to secure him, till just before the accident happened, whence it is attempted to be inforced, that the family thought his disorder only a sort of melancholy, and not a derangement of such degree as required confinement. I must say, that if this event had taken place eight days sooner than it did, this circumstance would have come with very great force against the pannel; but, in the actual circumstances of the case, it comes with more force in his favour, and is a consideration of weight upon his side. For, it is proved that a nurse had actually been provided to take care of him, and a strait waistcoat prepared to put on him; and pity it is that this plan was not timeously put in execution.

Gentlemen, I shall not take up more of your time. You will consider the evidence well, and decide according to your consciences. If you are convinced that he knew right from wrong, you will return a verdict of guilty. On the other hand, if it shall appear to you that he was not able to distinguish between moral good and evil, you are bound to acquit him. But Gentlemen, I think that, in all events, a verdict of not guilty, is not the proper verdict for you to return. I think you ought to return a special verdict, finding that the pannel was guilty of taking the life of his brother, but finding also that he was insane at the time.

It was upon Tuesday morning about seven o'clock when the Lord Justice Clerk concluded his speech. His Lordship proposed, that the Court should adjourn, after appointing a time for receiving the verdict: But, on a suggestion from one of the Jury, (in which the rest concurred, after conversing together in a whisper, for a minute or so,) the Court agreed to sit until the verdict should be returned. The Jury were accordingly inclosed; and, after being absent about 35 minutes, again appeared in Court, with a verdict written out in the following terms.

THE VERDICT.

At Edinburgh the 30th June, 1795.

The above assize having inclosed, made choice of the said Andrew Wauchope of Niddry Marischal to be Chancellor, and of the said Elphingston Balfour to be their clerk; and, having considered the criminal indictment raised and pursued at the instance of his Majesty's Advocate, for his Majesty's interest, against Sir Archibald Gordon Kinloch of Gilmerton, Baronet, pannel, the interlocutor of relevancy pronounced thereon by the Court, the evidence adduced in proof of the indictment, and evidence adduced in exculpation, they all in one voice find it proven, that the pannel killed the deceased Sir Francis Kinloch of Gilmerton, Baronet, his brother-german, in the way and manner mentioned in the Indictment; But find it proven, that, at that time the pannel was insane, and deprived of his reason. In witness whereof, their said Chancellor and Clerk have subscribed these presents, in their names, and by their appointment, place and date aforesaid.

{ ANDREW WAUCHOPE, *Chancellor.*
{ ELPHINGSTON BALFOUR.

This verdict having been recorded, and read by the Clerk of Court, the Jury were discharged, and the Court adjourned till Friday the third of July. From that day, however, their Lordships again adjourned till Friday the tenth of the same month; and then, on account

account of Court of Seſſion's ſitting later than what had been expected, a further adjournment took place till the Wedneſday following.

Wedneſday, July 15. 1795.

The Court met between ten and eleven o'clock in the forenoon, when, after the uſual proclamation had been made, the Clerk of Court was deſired to read the verdict of the Jury. The Lord Juſtice Clerk, as Preſident, then called upon the other Judges who were preſent to deliver their opinions; which they did *ſeriatim*, according to their ſeniority.

Lord Eſkgrove. The Jury, in this melancholy caſe, have returned a diſtinct verdict, by which "they, all in "one voice find it proven, that the pannel killed the de- "ceaſed Sir Francis Kinloch of Gilmerton Baronet, his "brother-german, in the way and manner mentioned in "the indictment; but find it proven, that, at that time, "the pannel was inſane, and deprived of his reaſon." It is now to be conſidered by the Court, what muſt be the legal conſequences of this verdict.

The crime charged againſt the pannel in the indictment, is the crime of *murder*, which, being one of the deepeſt dye, and aggravated in this caſe by the near relation between the parties, is indeed hardly credible to have been committed by any perſon endowed with the feelings and faculties of the heart and underſtanding; and we have here concluſive evidence from the verdict (which is our rule) that although the ſhocking deed of killing was committed, yet the perpetrator was at the time, by the will of God, deprived of that moſt invaluable gift of reaſon, the diſtinguiſhing bleſſing and ornament of the human kind. In this miſerable ſituation, could he be guilty of *murder*? I apprehend that he could not: Becauſe the eſſence of a crime conſiſts in the *animus*, and intention of the committer, conſidered as a free agent, and in capacity

of diſtinguiſhing between moral good and evil. A human creature deprived of reaſon, and diſordered in his ſenſes, is ſtill an animal, or inſtrument poſſeſſing ſtrength and ability to commit violence; but he is no more ſo than a mere mechanical machine, which, when put in motion, performs its powerful operations on all that comes in its way, without conſciouſneſs of its own effects, or reſponſibility for them. In like manner, the man under the influence of real madneſs, has properly no will, but does what he is not conſcious or ſenſible he is doing, and therefore cannot be made anſwerable for any conſequences. On this ground, I am clearly of opinion, that the pannel is not an object of puniſhment, and that he muſt be abſoilzied from the charge of murder, for which he has been tried by a moſt intelligent and reſpectable Jury of his country, whoſe verdict neceſſarily imports ſuch an acquittall.

But, ſhould your Lordſhips agree with me in that opinion, it will not altogether exhauſt or terminate the buſineſs; circumſtanced as it is. Your Lordſhips have further to diſcharge the duty you owe to the country, or to the people, by taking ſuch precautions for their future ſafety againſt ſimilar violences, as your wiſdom may direct, and to which your powers are undoubtedly adequate. The unfortunate Gentleman at the Bar, has unhappily been, while in a ſtate of inſanity, the inſtrument of depriving ſociety of one moſt valuable member. The verdict, in ſo finding, proves too well what horrid effects may flow from the depravation of reaſon in a perſon living at large: and the proof, which was adduced on the part of the pannel, likewiſe ſhows, that, during years preceding the fatal event, he was in various degrees, and at different periods, labouring under the ſame kind of mental diſorder, and even that (according to the obſervation of ſome witneſſes,) it had occaſionally attacked him ſince his late confinement. God, then only knows what might be the dreadful conſequences of his enlargement, and being ſuffered again to mix with the reſt of mankind. It is your Lordſhips duty to prevent, as far as you can, a poſ-

ibility

ibility of any perſon's ſuffering injury by that means: and the various adjudged caſes ſtanding in your records, well known both to the Judges, and the counſel, where the inſanity of the perpetrator at the time of the act was found ſufficient to exeem from puniſhment, do all ſhew, that your Lordſhips, and your predeceſſors, have, in every ſuch caſe, pronounced that kind of judgement, which, where I now ſit, it is incumbent on me to ſuggeſt.

I beg leave, therefore, to propoſe, that, while your Lordſhips aſſoilzie the pannel from the indictment for the crime of Murder, you ſhall ordain him to be carried from the bar, back to the Tolbooth of Edinburgh, and grant warrant to the Magiſtrates of Edinburgh, therein to receive and detain him during all the days of his life; but under this condition and exception, that, in caſe ſufficient caution to the ſatisfaction of this Court, ſhall be found acted in the Books of Adjournal thereof, under the penalty of *Ten Thouſand Pounds* Sterling, that the pannel ſhall be otherwiſe kept in ſure and ſafe cuſtody, during his life, the Magiſtrates, upon ſuch caution being ſo found, ſhall be authoriſed to deliver over the perſon of the pannel, into the hands and cuſtody of ſuch of his friends as may have given that ſecurity, who will, of courſe, be entitled to receive and detain him in cuſtody accordingly,

Lord Swinton. The verdict has left no room for any difference of opinion in the Court.—It has found the priſoner inſane, and deprived of his reaſon at the time of this fatal deed,—and therefore not guilty of the murder libelled. A perſon in the predicament ſtated by the verdict is inconſcious of the difference between moralgood and evil, and is not an object of puniſhment. Puniſhment is intended for example; but a perſon inſane can have no deſign; and to puniſh him can be no example. The ſentence of the Court, muſt, therefore, acquit the priſoner from this charge.

But, after this is done another duty remains upon the Court. It is a duty not only to puniſh, but to prevent all manner of evil. The ſame verdict, which finds the priſoner not guilty of murder, finds it proved that he was the

the inſtrument of his brother's death. Hence it is to be preſumed, that the ſame diſeaſe, which excited him to that fatal action, may recur, and be dangerous to other people. This we muſt prevent: and I therefore concur with the propoſal made by Lord Eſkgrove, that the priſoner ſhould be confined for life in the manner that has been ſtated. It is following the courſe obſerved by the Court in the like caſes of Spence, Coalſton and Blair, whoſe furious fits were fatal to the lives of other people.

Lord Dunſinnan. The melancholy event which gave occaſion to this trial, was accompanied, as appears from the verdict of the Jury, with no guilt upon the part of the pannel; and therefore can be the ſubject of no puniſhment; yet it was of ſuch a nature, as renders it the indiſpenſible duty of the court, in pronouncing judgement upon this verdict, to take ſuch meaſures as may afford full ſecurity to the public againſt any riſk of the ſame ſort in time coming, in caſe, at any future period, this unfortunate gentleman, ſhould by the viſitation of heaven, be again brought into the deplorable ſtate of becoming inconſcious of what he does, and conſequently not accountable for his actions. The plan, which has been propoſed, appears to be entirely adequate to that object, and therefore has my concurrence.

Lord Craig concured with the opinions delivered, and thought the judgement, which had been ſuggeſted, well adapted to the end in view.—And, *Lord Juſtice Clerk* having expreſſed himſelf to the ſame effect, the Clerk of Court proceeded to write out the judgement as follows.

THE JUDGEMENT.

15th of July, 1795.

The Lord Juſtice Clerk, and Lords Commiſſioners of Juſticiary having conſidered the verdict of Aſſize, dated and returned the 30th day of June laſt, in the trial of the ſaid

ſaid Sir Archibald Gordon Kinloch, pannel, whereby the aſſize, all in one voice, find it proven that the pannel killed the deceaſed Sir Francis Kinloch of Gilmerton Bahis brother-german, in the way and manner above mentioned in the indictment; but find it proven, that, at that time, the pannel was inſane and deprived of his reaſon: The ſaid Lords, in reſpect of the ſaid verdict, Find, that the ſaid Sir Archibald Gordon Kinloch, is not an object of puniſhment, and therefore abſoilize him *ſimplicitor*: But, in reſpect of the inſanity and deprivation of reaſon found proven, the ſaid Lords decern and adjudge the ſaid Sir Archibald Gordon Kinloch, to be carried from the bar, back to the tolbooth of Edinburgh, therein to be detained and confined priſoner during all the days of his life; or at leaſt, ay and until he is delivered to any friend or other perſon finding caution in manner aftermentioned: and the ſaid Lords grant warrant to, and ordain the Magiſtrates of Edinburgh, and keepers of their tolbooth, to deliver over the perſon of the ſaid Sir Archibald Gordon Kinloch, to ſuch friend or other perſon who ſhall find ſufficient caution and ſurety acted in the books of adjournal, to the ſatisfaction of this Court, to ſecure and confine him in ſure and ſafe cuſtody, during all the days of his life, and that under the penalty of L. 10,000 Sterling, ; and, in the meantime, ordain the Magiſtrates of Edinburgh, and keepers of their tolbooth, to receive and detain him priſoner, in terms of, and agreeable to the above ſentence, as they ſhall be anſwerable on their higheſt peril.

ROBERT M'QUEEN, *J. P. D.*

This judgement having been ſubſcribed, and read, the priſoner retired from the bar.

CERTIFICATE OF CAUTION

being found in terms of the Judgement.

I ROBERT M'QUEEN of Braxfield, Lord Juſtice Clerk, hereby

hereby certify, That Doctor William Farquharſon, one of the Members of the Royal College of Surgeons in the city of Edinburgh, has found ſufficient caution and ſurety, acted in the Books of Adjournal of the High Court of Juſticiary, That he ſhall ſecure and confine Sir Archibald Gordon-Kinloch of Gilmerton, now priſoner in the tolbooth of Edinburgh, in ſure and ſafe cuſtody, during all the days of his life, in terms of, and conform to the ſentence of the ſaid Court in all points, pronounced againſt him upon the 15th day of July current. Witneſs my hand, this 17th day of July 1795.

ROBERT M'QUEEN.

In conſequence of this certificate, Sir Archibald was removed from priſon on Friday the 17th of July 1795.

LIST

LIST of the WITNESSES cited on both Sides, *of whom only those marked thus * were examined.*

——— WITNESSES for the CROWN, *of whom those marked thus † were likewise cited for the pannel.*

1. Alexander Kinloch, Esq; son of the deceased Sir David Kinloch of Gilmerton, Baronet.†
*2. Walter Gibson servant to the said Alexander Kinloch.†
*3. Alexander Menie, sometime butler to the deceased Sir Francis Kinloch of Gilmerton, now residing in Edinburgh.†
*4. George Douglas, servant to Miss Kinloch, daughter of the deceased Sir David Kinloch of Gilmerton, Baronet.†
*5. Alexander Campbell, lately postillion at Gilmerton, now servant to James Drummond, Esq; of Perth.†
*6. William Reid Gardner at Gilmerton.†
7. William Temple chaise-driver in Haddington.†
*8. Dr Alexander Monro Physician in Edingurgh.†
9. Dr Francis Home physician in Edinburgh.†
*10. Dr James Home physician in Edinburgh.†
*11. Mr Benjamin Bell surgeon in Edinburgh.†
*12. Dr William Farquharson surgeon in Edinburgh.†
*13. Mr George Somner surgeon in Haddington†.
*14. Alexander Fraser Sheriff-clerk to the county of Haddington.†
*15. Hugh Dods clerk to the said Alexander Fraser.
*16. Duncan M'Millan writer in Edinburgh.†
*17. Mr Charles Hay advocate.
*18 The Rev. Mr George Goldie minister of the Gospel at Athelstoneford.†
*19. John Walker tenant in Beanston.†
20. James Clerk, Esq; Sheriff-depute of the County of Edinburgh.
21. Joseph Mack writer in Edinburgh.

22. William

22. William Scott Procurator-fiscal of the County of Edinburgh.
23. William Stephens Sheriff-officer in Edinburgh.
24. William Dumbreck hotel keeper, in St. Andrew's Square, Edinburgh.†
25. William Graham waiter to the said William Dumbreck.†
26. Charles Manderson postilion to the said William Dumbreck.†
27. James Robertson keeper of the Black Bull Inn, Edinburgh.
28. Patrick Lee vintner in Edinburgh.†
29. Alexander Murker waiter to the said Patrick Lee.†
30. Mr Alexander Hislop Provost of Haddington.
31. Mr Thomas Fairbairn Sheriff-substitute of the Shire of Haddington.†
*32. Hay Smith writer in Haddington.
33. James Stormonth writer in Edinburgh.†
34. Patrick or Peter Dickson, sometime coachman to the late Sir David Kinloch of Gilmerton, Baronet.†
35. Margaret Muir residenter in Haddington.†
36. James Robertson keeper of Edinburgh Jail.
37. Alexander Goodwin inner-keeper of said Jail.
38. James Laing, jun. writer in Edinburgh.
39. Mr Richard Somner surgeon in Haddington.

WITNESSES cited for the Pannel only.

*1. Miss Janet Kinloch, daughter of the deceased Sir David Kinloch.
*2. Lieutenant Colonel Samuel Twentyman.
*3. Captain Henry Miller of the Staffordshire Militia.
*4. Major John Mackay.
5. Mr Francis Anderson writer to the Signet.
6. Mr Alexander Low tenant at Woodend.
7. John Reid master of old Slaughters coffee-house, St. Matin's-Lane, London.

8. John

8. John Parſons hairdreſſer, No. 8. Little Suffolk Street London.
9. Margaret Curtis widow of Michael Curtis occaſionally ſervant to the pannel.
10. William Urquhart perfumer and hairdreſſer, No. 4. Panton Street, Haymarket London.
11. Mrs Margaret Hay his mother in law.
12. Alexander Urquhart green grocer London.
13. John Johnſton grieve at Gilmerton.
14. Jane Logie chamber-maid at walkers hotel, Prince's Street Edinburgh.
15. Robert Dickſon poſtilion to Mrs Fairbairn at Haddington.
16. Henry Gibſon waiter to Mr Lorimer Dunbar.
17. William Turnbull poſtilion to Mr Frafer at Dunbar.
18. Elizabeth MacDougal hen wife at Gilmerton.
19. William Sandie driver of the Haddington coach.
20. Thomas Temple, hoſtler to Mrs Fairbairn Haddington.
21. William Moffat Forreſter at Gilmerton.
22. David Hunter labourer at Gilmerton.
23. Alexander Fergu ſon labourer there.
24. Francis Buchan wright North Berwick. And
25. The Reverend Dr. David Johnſton miniſter of the goſpel at North Leith.

FINIS.

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